

(21,279.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 215.

THE CITY OF MEMPHIS, JAMES H. MALONE, AND  
GEORGE T. O'HAVER, APPELLANTS,

*vs.*

THE CUMBERLAND TELEPHONE AND TELEGRAPH  
COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print
Caption .....	a	1
Specification of respondents as to parts of Exhibit "C" to stipulation of counsel to be included in printed record.....	1	1
Stipulation of counsel as to parts of record they desire to be included in transcript on appeal.....	2	2
Original injunction bill .....	3	2
Restraining order .....	24	15
Exhibits to original bill.....	26	16
Exhibit A—Charter of the Cumberland Telephone and Telegraph Company of Kentucky.....	26	16
Articles of incorporation, C. T. & T. Co.....	27	16
Amendment of December 21, 1883.....	31	19
Amendment of May 14, 1889 .....	34	21
Articles of incorporation, G. S. T. & T. Co.....	36	23
Amendment of December 21, 1883.....	40	26
Articles of consolidation with G. S. T. & T. Co....	42	28
Amendment of March 3, 1899.....	51	35
Act to incorporate the Ohio Valley Telephone Co..	56	39
Amended articles of incorporation of C. T. & T. Co.	59	42
Articles of consolidation with O. V. T. Co.....	63	45
Amended articles of incorporation of C. T. & T. Co.	72	53

	Original.	Print
Exhibit B—Proceedings of a meeting of the legislative council of the city of Memphis, July 16, 1903. ....	76	57
C—Ordinance to regulate charges of telephone companies in the city of Memphis, September 24, 1907. ....	81	60
D—Statement of earnings and expenses of C. T. & T. Co. at Memphis, Tennessee, for year 1906. ....	83	61
Cost bond. ....	85	62
Restraining order bond. ....	86	63
Summons. ....	88	64
Marshal's return on summons. ....	89	64
Certified copy of restraining order. ....	90	65
Marshal's return on restraining order. ....	93	67
Order continuing hearing of application for preliminary injunction. ....	94	67
Answer of respondents. ....	95	68
Exhibit "A"—August, 1907, statement of C. T. & T. Co. ....	102	72
Opinion of court. ....	110	75
Affidavit of H. Blair Smith. ....	113	77
Exhibit—Classification of rates. ....	117	op. 79
Bond on preliminary injunction. ....	121	80
Order granting preliminary injunction. ....	123	81
Commission to take depositions. ....	124	82
Stipulation as to depositions. ....	125	83
Deposition of James E. Caldwell. ....	126	83
Deposition of H. Blair Smith. ....	206	129
Exhibit No. 1 to H. Blair Smith's deposition—Statement showing earnings and expenses of Cumberland Telephone and Telegraph Co., 1902 to 1907. ....	232	142
Exhibit No. 2 to deposition of H. Blair Smith—Statement showing maximum and minimum rates of Memphis exchange from 1884 to 1908. ....	233	143
Exhibit No. 3 to deposition of H. Blair Smith—Statement showing average number of subscribers, revenue, and average to station at Memphis. ....	234	144
Exhibit No. 4 to H. Blair Smith's deposition—Statement of free service furnished city of Memphis, showing cost of same annually from 1891 to 1907. ....	235	op. 144
Exhibit No. 5 to deposition of H. Blair Smith—Classification of rates as of September 22, 1907, of the subscribers of Memphis telephone exchange. ....	240	op. 144
Exhibit No. 6 to deposition of H. Blair Smith—Estate of loss in revenue to complainant in event it was compelled to charge the rates provided by ordinance of October 2, 1907. ....	244	145
Exhibit No. 7 to deposition of H. Blair Smith—Statement of earnings and expenses for year 1907, Memphis exchange. ....	245	146
Exhibit No. 8 to deposition of H. Blair Smith—Per cent of earnings of complainant company in cities of Nashville, Louisville, Chattanooga, Evansville, and New Orleans. ....	247	147
Exhibit No. 3 to deposition of James E. Caldwell—Statement of average rent and royalties paid on complete instruments. ....	247	147
Exhibit No. 4 to deposition of James E. Caldwell—Statement of royalties on Memphis switchboards from 1883 to 1899. ....	247	147
Deposition of Foster Hume. ....	248	148



# INDEX.

111

	Original.	Print
Replication of complainant. ....	275	163
Agreement of counsel as to proof, filed March 2, 1908. ....	276	164
Agreement of counsel as to proof, filed March 14, 1908. ....	320	188
Exhibit "A" to agreement of counsel—Incorporation of Memphis T. & E. Co. ....	323	189
Exhibit "A-2" to agreement of counsel—Amendment to charter of Memphis T. & E. Co. ....	331	194
Exhibit C to agreement of counsel—Original bill in cause of City of Memphis <i>vs.</i> Cumberland Telephone and Telegraph Co., No. 14743, R. D., chancery court of Shelby county, Tennessee. ....	335	196
Exhibit "D" to agreement of counsel—Answer of Cumberland Telephone and Telegraph Co. to bill No. 14743, R. D., in chan- cery court of Shelby county, Tennessee. ....	341	199
Order disallowing motion of respondents for additional time within which to take proof. ....	353	206
Deposition of Robert E. Moran. ....	354	206
Order setting cause for hearing. ....	359	209
Stipulation of counsel as to certain proof. ....	360	210
Exhibit "A" to stipulation of counsel—Contract with city of Evans- ville, Indiana. ....	365	213
Exhibit C to stipulation of counsel—Status of telephone industry. . .	377	220
Exhibit "D" to stipulation of counsel—Telephone conditions in New Orleans, Louisiana. ....	392	229
Notice to take depositions. ....	517	301
Deposition of James E. Caldwell. ....	518	302
Exhibit No. 1 to deposition of James E. Caldwell—Report of com- mittee on gas, oil, electric lights, telephones, etc., to city council of Chicago, Illinois. ....	543	316
Exhibit No. 2 to the deposition of James E. Caldwell—Annual report of the directors of American Telephone and Telegraph Company to the stockholders, 1907. ....	675	392
Opinion of court sustaining complainant's bill. ....	702	406
Final decree. ....	706	408
Petition of respondents for an appeal. ....	708	409
Assignment of errors. ....	710	410
Order granting an appeal to respondents. ....	712	411
Bond on appeal. ....	713	412
Citation and service. ....	715	413
Certificate to transcript of record. ....	716	413



a In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appellee,  
vs.  
THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor, and GEORGE T. O'HAVER, Chief of Police, Appellants.

Appearances:

Wright & Wright, Memphis, Tennessee;  
Wm. L. Granbery, Nashville, Tennessee, Solicitors for Appellee.  
Thomas H. Jackson, Memphis, Tennessee,  
Marion G. Evans, Memphis, Tennessee,  
James L. McRee, Memphis, Tennessee, Solicitors for Appellants.

Walter Evans, Judge.

1 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.  
vs.

THE CITY OF MEMPHIS and Others.

*Specification of Appellant- as to Parts of Exhibit "C" to Stipulation of Counsel to be Included in Transcript on Appeal.*

Filed July 13th, 1908. Dan F. Eliotte, Clerk.

To the clerk of said court:

In accordance with the stipulation of counsel heretofore filed in this cause, we hereby indicate the following portions of a pamphlet exhibited as "Exhibit C" to a stipulation of counsel, filed herein, to be copied into the transcript of record to be filed in the Supreme Court of the United States.

- (1) All of pages 11, 12, 13, 14, and the first 4 lines on page 15.
- (2) All of page 31.
- (3) The marked passage on page 50.
- (4) The article entitled "Hot Fight in Michigan," on pages 58 and 59.
- (5) The marked passage on page 80.
- (6) The article entitled "Concerning Telephone Dividends"; pages 97, 98, 99, 100, and down to the bottom of page 101.

THOS. H. JACKSON,  
MARION G. EVANS,

*Solicitors for the City of Memphis.*

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAS. H. MALONE, Mayor, and GEORGE T.  
O'HAYER, Chief of Police.

*Stipulation of Counsel as to Making up Record Upon Appeal.*

Filed June 20th, 1908. Dan. F. Elliotte, Clerk.

It is hereby stipulated and agreed by counsel for both parties in this cause that in making up the record upon appeal to the Supreme Court of the United States, that Exhibit "B" to the stipulation of counsel setting forth the contract theretofore existing between the Cumberland Telephone & Telegraph Company and the City of Nashville be omitted, as it is agreed that the same was abrogated before the hearing of this cause.

It is likewise agreed and stipulated between counsel that Exhibits C. and D. to the stipulation of counsel heretofore filed in this case, as well as other Exhibits exhibited in pamphlet form, need not be copied in full in the record by the Clerk, but only such parts thereof as counsel for each party shall specify to the Clerk.

E. E. WRIGHT,

*Counsel for Complainant.*

MARION G. EVANS,

*Counsel for Defendant.*

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor, and GEORGE T.  
O'HAYER, Chief of Police of said City.

*Injunction Bill.*

Filed October 2nd, 1907. Dan F. Elliotte, Clerk.

To the Honorable Judges of the Circuit Court of the United States  
for the Western Division of the Western District of Tennessee, in  
equity sitting:

Comes your orator, the Cumberland Telephone & Telegraph Com-  
pany, and humbly complaining to Your Honors of the City of

Memphis, and of James H. Malone, Mayor, and of George T. O'Haver Chief of Police of said City, and for cause of complaint alleges and says:

### I.

That your orator, the Cumberland Telephone & Telegraph Company, is a corporation created, organized and existing under and by virtue of the laws of the State of Kentucky; that the defendant, the City of Memphis, is a municipal corporation created and existing under the laws of the State of Tennessee and located in the  
4 County of Shelby of said State; and that the defendant, James H. Malone, is the Mayor; and the said George T. O'Haver, the Chief of Police of said City. That both of them are citizens and residents of said City, and that all of them reside in the Western Division of the Western District of said State.

### II.

Your orator avers that the original Cumberland Telephone & Telegraph Company was chartered under the laws of the State of Kentucky on the 8th day of June, 1883, and that thereafter, and on the 4th day of March, 1898, it became and was consolidated with the Great Southern Telephone & Telegraph Company also a corporation chartered and existing under the laws of the State of Kentucky; and that thereafter, said consolidated Company was, and on the 27th day of January, 1900 became and was consolidated with the Ohio Valley Telephone Company, also a corporation chartered and existing under the laws of the State of Kentucky. That by the terms of each of said articles of incorporation your orator's corporate name remained unchanged, and that from time to time since the first and original charter of your orator was obtained, as aforesaid, there have been various amendments made, both to the original and consolidated charters. The said amendments, as well as said articles of consolidation, have all been made pursuant to and in compliance with the laws of the State of Kentucky.

Your orator files herewith a copy of its original charter, and all the various charters of consolidation, and the various amendments which have been made, and marks the same Exhibit "A" and prays that it may be taken and considered as a part of this bill of complaint.

5

### III.

Your orator avers that, as will be seen from an inspection of its articles of incorporation, its object was to conduct telephone and telegraph exchanges for the purpose of conveying intelligence through the medium of said exchanges and its lines of wire, connecting therewith its various patrons; and that all persons who desired, had a right to become patrons of said exchanges, and to receive the benefits of its service, upon paying the reasonable tolls and rents fixed by your orator without discrimination or favor.

## IV.

Your orator avers that after the date of its creation it organized and began the construction, and thereafter the operation, of telephone and telegraph exchanges in the various cities and towns in the State of Kentucky and in the State of Tennessee, and other States, and has, for many years, not only established and operated exchanges in said cities and towns, but has also connected its said exchanges with each other, so that for many years past it has had and operated a long distance system of telephones, all open to the use of its patrons and the public at large upon the payment of the reasonable tolls and rents imposed by your orator.

## V.

Your orator further avers that among others, it has owned and operated for many years, and now owns and operates a telephone exchange in the City of Memphis. The history of the original erection and operation of said exchange and its subsequent acquisition and continued operation by your orator, is as follows; to-wit:

6 In the year 1879, Samuel T. Carnes acquired the right to construct and operate a telephone exchange in the Taxing District of Shelby County, Tennessee (now the City of Memphis) from the Bell Telephone Company, or its Assignee. On December, 15th, 1879, he preferred a petition to the Taxing District authorities, in substance requesting that he be given the right to establish a telephone exchange in the Taxing District and to that end that he be allowed to place poles in the streets and string telephone wires thereon, and offered in part consideration for the grant of such a right, to allow the City to use his poles in stringing fire alarm and other wires for city purposes. Immediately upon said petition being filed, it was referred to Messrs. Overton, Goyer and Gunn, members of the Legislative Council, for investigation and report. Three days thereafter, to-wit: on the 18th day of December, 1879, the Committee reported to the Legislative Council the result of its investigations, and recommended that the prayer of the petition be granted, and on motion the report was received and adopted. Within the course of a few weeks thereafter, the said Carnes began the erection of a telephone exchange in pursuance of the authority thus granted, and pushed the same to completion.

Your orator is unable to file a copy of the original petition of said Carnes for the reason that the same appears to have been lost or mislaid by the Secretary of the Taxing District, or some one in his office; or, at any rate, it is not now on file, and cannot be found, and hence a copy thereof is not filed herewith, but the same is as already stated can, and will be verified by proper evidence.

7 The minute of the Legislative Council of the Taxing District show that on the 18th day of December, 1879, the Committee on the said Carnes' petition reported favorably thereon, and recommended that the Legislative Council grant him the right desired, and that the report was received and adopted.

The same will be found in Book (A) on page 96 of the minutes of the Legislative Council of the said Taxing District.

Said minutes also show in the same book and on page 115 thereof, and of date February 13th, 1880, that the Legislative Council had received a communication from the said Carnes, Manager of the Telephone Company, asking that the City engineer be instructed to show him the places where the poles should be planted, and that the Engineer was directed to do so.

Shortly thereafter, and on the — day of —, 1880, as appears in the said Minutes in Book (A), and on page 167 thereof, the Legislative Council of said Taxing District passed an ordinance, making it a misdemeanor to give a false alarm of fire through the telephone, punishable by fine; and also making it a misdemeanor to place telephone wires on the poles nearer than three (3) feet to the cross arm upon which the wires of the Fire Department were strung, etc.

In the year 1881, the Memphis Electric Telephone Company was duly chartered and organized, and the rights of said Carnes to operate a telephone company, as well as the physical property of the telephone exchange, was transferred to it.

In the year 1883, the original Cumberland Telephone & Telegraph Company in due form succeeded to all of the rights of the Memphis Electric Telephone Company, and from that time to this has continued its operation in the City of Memphis.

At the time your orator thus became the owner of said telephone exchange, the use of the phone was limited and the Memphis  
8 exchange was a small affair, and its sphere of operations were limited to the territory embraced in the then City limits, which covered only about four square miles. As Memphis increased in population and its business interests grew and enlarged, and as the knowledge of the value of and convenience of the telephone as an adjunct to business and as a means of easy and quick communication became more generally understood, the business of the exchange steadily grew so that it became necessary from time to time to plant new poles and extend new wires into larger areas of territory in and around said city.

Your orator further avers and shows that the Legislature of the State of Tennessee enacted a law which was approved and became effective on the 25th day of March, 1885, which, among other things authorized any person or corporation, organized by virtue of the laws of Tennessee, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system or transmitting intelligence which may be thereafter invented or discovered, to construct operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence, along and over public highways and streets of the Cities and towns of Tennessee, or across and under the waters, and over any lands or public works belonging to said States, and on and over the lands of private individuals and upon, along and parallel to any of the railroads or turnpikes of Tennessee, and on and over the bridges, trestles and structures of said railroads, with the provisor that the ordinary use of such public highways, streets, works, railways,

9 bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of said lands, railroads and turnpikes, by reason of the occupation of said lands, railroads and turnpikes by said telephone or telegraph corporations.

The right of eminent domain was also granted to such Companies by said Act. There were various other provisions which required, under certain conditions therein named, the said Companies to give preference to the authorities of the State or general government under penalties; and regulating the operations of said companies in divers ways in the interest of the general public which need not here be particularly set forth.

Said Act is chapter 63 of the Session Acts of 1885, beginning at page 120.

Your orator further shows that both from the time it became the owner of said exchange, and as well before and after the passage of said Act, it, from time to time, increased the sphere of its operations, both inside of the then Taxing District (now the City of Memphis), and outside of the City limits in the said County of Shelby adjacent thereto. So that its exchange served a large but ever increasing constituency, many of whom resided within said City, and many without. That thereafter, the limits of the said City were greatly enlarged, so that the poles and wires and instruments of your orator which had theretofore been outside of said city limits were brought within the same; but even when the limits of said City were thus enlarged, the business of your orator continued to expand so that it became necessary to locate many poles and wires along the highway of Shelby County adjacent to and beyond said City limits, incorporating the same into and making them a part of said exchange.

10 That from the beginning and during the entire time of its ownership of said exchange until this ordinance was passed your orator recognizing the right of the City authorities in the exercise of its police power to regulate its operations in the matter of planting poles and stringing wires to the end that the lives and property of the citizens of said City might not be injured, nor the public streets thereof unduly impeded, and before planting said poles or stringing said wires, has invariably informed said City when it contemplated so doing, and has notified it of the place of planting said poles and where it proposed to construct said wires, and asked its privilege therefor. Such privilege has uniformly been granted by said City, subject to such modifications as the City Engineer or other City authorities might think expedient for the public interests; but the right of your orator to plant said poles or string said wires, subject to such reasonable rules as the City authorities might seem fit to impose, has never been questioned at any time or under any circumstances. On the contrary, such right has always been impliedly and often explicitly recognized by said City authorities.



## VI.

Your Orator further avers that as a result of its labors and the growth of population and wealth of the City of Memphis and of the territory tributary thereto, its business has grown many fold since it originally began operations, until now it has more than 7,600 subscribers who are connected with and served by your orator's telephone exchange in said City of Memphis, and the demands by subscribers for telephonic service by said exchange is steadily growing.

That in addition to this your orator has, through a long distance system, connected the Memphis exchange with a vast area of country embraced in the States of Indiana, Kentucky, Illinois, Tennessee, Mississippi and Louisiana.

11

## VII.

Your orator avers that during the long period of time it has been operating a telephone exchange in the City of Memphis, as aforesaid, the right of your orator to occupy the streets of the City of Memphis and the roads and highways of Shelby County with its poles and wires has never been questioned; but, on the contrary, has frequently been recognized by said City authorities; nor has the right of your orator to charge such tolls and rentals for its service to its subscribers as it has heretofore charged been questioned or challenged by the City authorities until the passage of the said ordinance hereinafter referred to.

## VIII.

That on the 25th day of February, 1902, the Legislative Council of the City of Memphis by an ordinance imposed a tax of \$3.00 per annum on each and every pole of your orator in the streets of said City, and attempted to enforce same by a suit brought in the Chancery Court of Shelby County which was by your orator removed to this Court. That thereafter and on the 16th day of July, 1903 your orator entered into an agreement of compromise with the City authorities of Memphis by the terms of which the said City dismissed said suit, upon the payment of costs by your orator, in consideration that your orator agree not to charge for its services as a telephone Company an amount which shall exceed an average per station, (that is, for each telephone used by a subscriber.) an average exceeding one dollar per week until the number of stations connected with the exchange of said company shall exceed 7,000, when the limitations upon the charges so fixed were to cease.

Your orator also agreed to furnish free of charge for the use of the Police and Fire Departments of said City one duct in its underground system which it had theretofore, in pursuance of the demands of said City, constructed at a cost of more than \$100,000.00 throughout the business section of the City. Your orator also agreed to permit said City to use all of its poles then or thereafter erected for the wires of the Police and Fire alarm system of the City, and to erect uprights and cross-arms at such reasonable dimensions and construction as the City may direct upon the top of its poles for the placing of said wires, which were to be so placed as

12

not to interfere with the wires of your orator. Your orator also agreed to erect and establish a ringing circuit and establish bells and generators for same in all of the fire engine houses of said City at that time or thereafter used or required; to establish and erect a twelve drop switch board for the police station of said city, and extension lines for eight desk sets in the Police Station of said City; and furthermore to furnish telephones free of charge to the following City Institutions and offices, to-wit: The City Secretary's office, Mayor's office, Board of Health, Two crematories Board of Health, Engineer's office, Two City Stables, City Hospital, and the same service to public school buildings as had theretofore been rendered; and this free service your orator agreed to perform and has continued to perform so long as it has operated a telephone exchange in said City.

A copy of this contract and agreement of compromise is filed herewith and marked Exhibit "B."

### IX.

Your orator further avers that it has from the beginning of its ownership of said exchange furnished a considerable amount  
 13 of free service to the City authorities which, from time to time, had been increased prior to the execution of said agreement of compromise, and that since said agreement was entered into, it has fully lived up to all of its provisions in all respects.

Your orator further avers that its present schedule is for each direct line from the exchange to a business house using one telephone \$90.00 per annum payable quarterly in advance; for like service to two business houses which are on the same line but each having a separate Phone, \$54.00 per annum, payable quarterly in advance; for each residence for a direct single telephone \$42.00 per annum, payable quarterly in advance; for each residence when two telephones are on a single line, \$36.00 per annum, also payable quarterly in advance. When so payable quarterly in advance, a discount will be allowed by your orator of 50¢ per month.

Your orator has also heretofore given a rate to business houses where there are four business houses on one line each of which, however, of course, have a separate telephone of \$48.00 per annum, payable monthly in advance. It still continues this rate where the phones are actually in operation, but does not quote this rate to new subscribers.

Your orator also has a number of telephones which have heretofore been used in private residences upon which it quotes a rate of \$36.00 per annum, and residences in which two telephones are on a single line of \$30.00 per annum, both payable quarterly in advance, and also having a discount for payment in advance as above mentioned. Whilst it is allowing these last mentioned low rates to stand, they are unprofitable, and no new business is received upon this basis; and your orator has reserved the right to raise said rates to a reasonable and profitable basis whenever it sees proper to do so.

14

## X.

Your orator further avers that the rates mentioned in the preceding paragraph do not average \$1.00 per week per telephone, for the reasons that whilst there are about 900 business houses which pay the rate of \$90.00 per annum, all the rest of its subscribers are paying the lower rate, and when the whole is averaged it does not equal, as above stated, \$1.00 per week per telephone.

## XI.

Your orator further avers that the rates thus charged so far from being excessive are in fact too low, and are not sufficient to yield a reasonable return upon the actual investment in the Memphis Telephone Exchange, as will be hereinafter shown more fully and in detail. At the time it thus entered into the said compromise arrangement with said City, whilst the rates even then were very low, and hardly yielded a fair return upon your orator's investment in said exchange, yet they were relatively higher than they are at present, for the reason that the price of labor, material and general expenses of operation were considerably less than it is now.

## XII.

Your orator further avers that in entering into said compromise arrangement, it did so in spite of the fact that it was advised by its counsel and believed that the imposition of said pole tax by said city was illegal and void; its motive for thus entering into the agreement of compromise was to end any question as to its rights of street occupancy; and moreover to avoid and settle any possible cause for disagreement between itself and said City which, for obvious reasons, were undesirable. In so far as the service was concerned which it thereby agreed to give, it had already theretofore been giving the major portion of it as a mere gratuity, and was willing to  
15 contribute for the sake of peace something more.

## XIII.

Your orator further avers that the provisions in the first section of said agreement of compromise, whereby it was in effect agreed, that when the number of telephones connected with the exchange of your orator exceeded 7,000, the provision that not more than \$1.00 per week per telephone should be charged, should cease, was because the maximum charge thus agreed on was in itself a very low rate, even when fewer than 7,000 telephones were connected with the exchange. Even when fewer than 7,000 telephones were connected with the exchange it was not fairly remunerative, but when the number of telephone connections were increased above that figure, the cost of operation became proportionately heavier, and it was intended to leave your orator free to charge such rates as were fairly remunerative in view of the extent of the investment and nature of the business.

In this connection, it is proper that your orator should explain that the cost of the service by any telephone exchange to a small

number of subscribers is less proportionately than to a greater number, and that as the number increases the cost and expenses of operation increases in more than arithmetical proportions, for reasons which are well understood by all persons familiar with the service, but which need not here and now be elaborated in detail.

#### XIV.

Your orator further shows that notwithstanding the premises the Legislative Council of the City of Memphis, assuming to have the right to regulate and fix the charges which your orator should make to its subscribers, on the 24th day of September, last, enacted the following ordinance:

#### An Ordinance

#### To Regulate Charges of Telephone Companies in the City of Memphis.

SECTION 1. Be it ordained by the legislative council of the city of Memphis, That all telephone companies operating a system of telephones in the City of Memphis shall charge for each telephone in places used for business purposes, not exceeding five dollars per calendar month; and for each telephone in private residences not exceeding two dollars and fifty cents per calendar month. And every subscriber for either a business or residence telephone shall have the right to pay for the same monthly in advance, in accordance with the above rates. And such telephone Company shall have the right to charge an increased rate of fifty cents per month to all subscriber- who remain in default after the tenth of each month. Provided, this ordinance shall not apply to telephone Companies whose rates are fixed by contract with the City of Memphis.

SECTION 2. Be it further ordained, That such telephone Company that shall charge more for the use of its telephones than the respective amounts above set out shall be guilty of a misdemeanor, punishable by fine of ten dollars for each offence. And each day that any such telephone is operated by any telephone company at a rate in excess of that above set out shall constitute a separate offence under this ordinance.

17 SECTION 3. Be it further ordained, That any telephone Company operating a telephone system in the city of Memphis which, after being tendered the rates above set out in this ordinance shall refuse to operate telephones for those who demand same shall be guilty of a misdemeanor and punishable by a fine of \$10.00 for each offence. And each day that such telephone Company continues its refusal to operate any telephone after such tender and demand shall constitute a separate offence under this ordinance.

SECTION 4. Be it further ordained, That this ordinance take effect from and after its passage, the public welfare requiring it.

Passed final reading, Tuesday, September 24th, 1907.

JAMES H. MALONE, *Mayor*.

Attest:

ENNIS DOUGLAS,  
*City Register.*

A certified copy of this Ordinance is herewith filed and marked Exhibit "C."

### XV.

Your orator says that it is advised by counsel and avers and charges that said ordinance is null and void, in the first place for the reason that the Legislative Council of said City has not power or authority to fix or prescribe the rates which your orator shall charge; that said city is a municipal corporation created by an Act of the Legislature of the State of Tennessee, approved January 31st, 1879, entitled, "An Act to establish Taxing Districts in this State and to provide the means of local government for the same" and by numerous subsequent Acts of the Legislature of said State amendatory thereof, the last and most elaborate of said amendments having been passed on the third day of February, 1905 and approved

18 March 10th, 1905. That the said City, under said Acts of incorporation, has only such powers as are given to it by express terms or by necessary implication and that nowhere will there be found any, or in all of said Acts of incorporation, any power or authority to fix, regulate or change the rates charged by your orator or other telephone companies, and an attempt to do so is simply an abuse of power inherent to the Legislature, but which it (said city) wholly lacks.

### XVI.

Your orator further avers that said ordinance is null and void because it is unjust, inequitable and unreasonable, in that it fixes the maximum tariff or rate of charges beyond which your orator is forbidden to go, under severe penalties, which is so low that your orator could not operate its exchange without actual loss of money to it; and indeed, is in truth and effect confiscatory in that it totally destroys the value of your orator's plant in the City of Memphis for profitable use as a telephone exchange.

In support of this averment your orator states and shows that during the year 1903, the result of the operations of its exchange in the City of Memphis, was as follows:

Its gross earnings were.....	\$281,875.77
Its total expenses were.....	259,724.51

---

Leaving a net revenue or income of..... \$22,151.26

The actual cost of its telephone plant in said city at the end of the said year 1906 was \$1,014,945.13.

As an arithmetical calculation will show, the net earning of the company as the result of the operations of its plant in the City of Memphis during the said year 1906 was only 2.18 per cent of the actual investment and cost of its said exchange and plant.

19 Your orator further shows that it has made an accurate and careful examination to ascertain the result of its operations from September 1st, 1903 to August 31st, 1907. During this period it has invested \$96,673.08 in new construction and perma-

nent betterment of its plant in said City. The result of its operations during this twelve months, ending August 31st, 1907, is as follows:—

Gross Earnings.....	\$300,748.83
Expenses .....	299,367.19

Showing as a result a net profit to your orator for said operations of.....	\$1,381.64
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This falling off in net revenue has not been due to any lack of care or effect on the part of your orator, who kept its expenses down to as low as possible, having in view its ability to meet its obligations, but resulted from the largely increased price of wire, poles and other articles which enter into the construction of a telephone plant.

It will thus be seen that with the reductions proposed by said ordinance, not only will your orator be unable to earn any return upon the large investment it has already made, as above shown and set forth, but if it carries on its exchange in Memphis at all, must do so at any actual loss.

Your orator files herewith a statement showing more in detail the result of the two years' operations above mentioned, marks the same Exhibit D, and prays that the same may be taken and considered as a part of this bill.

In this connection your orator desires to say that it has always and is now anxious to have its books and vouchers relating to not only the actual cost of its Memphis plant, but to its expenses legitimately incurred in operating the same, and would be willing, as it has stated to members of the Legislative Council in an informal way, to have them make the investigation or appoint persons for that purpose; and whilst in one aspect it regrets the necessity of filing this bill, it is glad in another to lay before its patrons and subscribers in the City of Memphis the true facts in regard to its operations and the results thereof in said city.

Your orator further states that said ordinance was passed by the Legislative Council of said City, not only without making any investigation whatever, but in ignorance of what was a reasonable rate, (assuming that it had the power to deal with the subject at all, which is denied) and without the least regard to the vested rights of your orator, or to equity and justice, and it is for the reasons set forth in this paragraph null and void.

## XVII.

Your orator further avers that the provisor to the second clause of said ordinance in effect declares that said ordinance and its penalties shall not be applicable to any Telephone Company whose rates are fixed by contract with said City. The Memphis Telephone Company, a corporation which is a competitor and rival of your orator has, as your orator is informed and believes, a contract by which its rates, or at least its maximum rates, are prescribed with said City; but other telephone companies, under the act of 1885,



have the right to do business in the City of Memphis and the same territory adjacent thereto as that in which your orator does business, and the said city (assuming that it has the right to fix rates) Under the terms of this ordinance, might permit it to occupy the same field as that occupied by your orator, and yet charge higher rates than that prescribed by said ordinance under heavy penalties to your orator.

For this reason also your orator is advised and charges that said ordinance is unjust and discriminating against your orator, and therefore, null and void.

21

## XVIII.

Your orator further avers that all of its contracts with its subscribers are made for the period of one year, and that it will not enter into a contract by which it will install a telephone in the business house or residence of any subscriber for the period of one month, for the reason that the investment of your orator in installing a telephone in the business house or residence of a subscriber for one month is wholly out of proportion for the amount to be received for the amount of tolls. Your orator has therefore established the rule, which it avers is entirely just and reasonable, that all contracts should run for the period of one year, and it avers that as it is informed and believes, the rule is universal among all telephone companies to make all contracts by the year with subscribers for the reasons indicated. Notwithstanding this, said ordinance provides that every subscriber for every business or residence telephone shall have the right to pay for the same monthly in advance in accordance with the rate fixed by said ordinance including, of course, both new and old subscribers.

The ordinance assumes therefore to prescribe a rule of contract for your orator which is wholly unjust and oppressive, and for this reason is null and void.

## XIX.

Your orator further avers that it is the purpose of the City of Memphis, of James H. Malone, its Mayor, and of George T. O'Haver its Chief of Police to enforce said ordinance, unless restrained by your Honors; and that its subscribers are daily renewing its contracts with your orator and paying tolls and dues to your orator under existing contracts, and if your orator insists upon the payment of its present existing rates (which, as already stated, are not excessive but unreasonably low) they will be involved in numerous controversies, differences and lawsuits, with said subscribers who will claim the benefit of the rates fixed by said ordinance and will refuse to pay your orator its fair and reasonable rates to the great loss and injury to your orator and that finally your orator and its agents will be subject to numerous criminal prosecuting for failing and refusing to obey the requirements of said ordinance in the matter of rates, and will be harassed and put to great cost and expense by being arrested and compelled to employ counsel to pro-

22

tect its right and that of its agents in such numerous and vexatious prosecutions.

The premises considered, and in view of the fact that your orator has no adequate remedy at law, it prays that a writ of subpoena commanding the defendants the City of Memphis, James H. Malone, Mayor, and George T. O'Haver Chief of Police of said City to appear and answer this bill, but not under oath, oath being expressly waived according to the rules of the Court and the practice in such cases.

That a preliminary restraining order issue commanding the City of Memphis, the said James H. Malone and the said George T. O'Haver as Mayor and Chief of Police, respectively, and all acting under and by their authority to desist and refrain from attempting to enforce the terms and provisions of said ordinance or from in any manner interfering with your orator or its agents in charging its said subscribers its present rates or such reasonable rates as it may fix and prescribe for the service it renders its subscribers and users of its said telephone exchange.

That a preliminary injunction issue to the same effect. That on the final hearin- this injunction be made perpetual, and that your orator be granted all such further, other and general relief as  
23 to your Honors may seem met and proper upon the facts as herein above set forth.

This is the first application for a writ of injunction.

WRIGHT & WRIGHT,  
*Solicitors for Complainant.*

STATE OF TENNESSEE,  
*County of Shelby:*

Foster Hume, being duly sworn according to law, on his oath says, that he is the District Superintendent of the Cumberland Telephone & Telegraph Company, and that he has full power and authority to, and does make this affidavit in its behalf; that the matters and things in the foregoing bill alleged of his own knowledge are true, and those alleged upon information and belief he verily believes to be true.

FOSTER HUME.

Subscribed and sworn to before me this 2nd day of October, 1907.  
DAN F. ELLIOTTE, *Clerk.*



24 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

CITY OF MEMPHIS, JAMES H. MALONE, Mayor, and GEORGE T. O'HAYER, Chief of Police of said City.

*Original Restraining Order.*

Filed October 2nd, 1907. Dan F. Ellicotte, Clerk.

Whereas, in the above styled cause it has been made to appear upon the sworn Bill of Complaint and Exhibits attached thereto that a writ of injunction preliminary to a final hearing is proper and that prima facie complainant is entitled thereto, enjoining defendants from acts complained of and threatened.

It is therefore upon motion of said complainant Ordered that each and every one of the defendants appear before the Circuit Court of the United States for the Western Division of the Western District at Memphis, Tenn., on the 9th day of October, 1907, at 10 A. M. to show cause, if they have any why the preliminary injunction prayed for in complainant's bill should not issue.

And it further appearing that there is danger of a irreparable wrong and injury being caused and inflicted upon the complainant before the hearing of said application for preliminary injunction unless each and every one of defendants are restrained as hereafter set forth. Now therefore, complainants application for said restraining order is hereby granted upon its giving good & sufficient bond to be approved by the Clerk of the Circuit Court in the sum of Ten thousand dollars (\$10,000.00) securing defendants against any and all loss or damages arising out of or resulting from the issuing of this order if it should be finally determined that it was improperly issued.

Now, therefore, it is ordered that each and every one of said defendants, to-wit: City of Memphis, Jas. H. Malone, Mayor and George T. O'Hayer, Chief of Police of said City, their agents, servants, attorneys and all persons acting by or under their direction and authority be and are hereby restrained, enjoined and prohibited from attempting to enforce the terms and provisions of an ordinance of the City of Memphis September 24th, 1907, entitled "An ordinance to regulate charges of Telephone Companies in the City of Memphis, the full provision of which are set forth in complainant's bill and from in any manner interfering with Complainant, the Cumberland Telephone and Telegraph Company its officers or agents in charging its subscribers and patrons its present rates or such reasonable rates as it may fix and prescribe for the service rendered its subscribers and users of its said telephone exchange until further orders of the Court.

It is further ordered that a duly and properly certified copy of this order be served on each and every one of said defendants and the service thereof shall be sufficient notice to said defendants to appear and show cause on the 9th Oct. 1907, as above ordered.

Issued this 2nd day of Oct. 1907.

JNO. E. McCALL, *Judge.*

EXHIBIT "A" TO ORIGINAL BILL.

Filed October 2nd, 1907. Dan F. Elliotte, Clerk.

*Charter of the Cumberland Telephone & Telegraph Company of Kentucky, 1905.*

27 Articles of Incorporation of the Cumberland Telephone & Telegraph Company.

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56), 1561, of the General Statutes of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles, hereinafter expressed.

Article 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Cumberland Telephone & Telegraph Company. Its principal place of business is in the city and county of Henderson, State of Kentucky.

Article 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems.

Article 3. The amount of capital stock authorized is not less than Four Hundred Thousand Dollars and may be increased to Three Million Dollars, divided into shares of One Hundred Dollars each, and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

Article 4. The existence of said corporation commences on the eighth day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount, and a majority in number of the stockholders.

Article 5. The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed 50 per cent of its capital stock actually paid in.

Article 6. The affairs of said Company are to be controlled by a Board of nine Directors, and a President and Vice President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company,

28 and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of three members each,

the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, and all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Article 7. The private property of the corporators and stockholders of said corporation shall be exempt from the corporate debts of said company.

Witness our hands, this eighth day of June, 1883.

E. S. BABCOCK, JR.  
PAUL J. MARRS.  
MILO G. KELLOGG.  
E. P. HUSTON.  
E. T. BAKER.  
J. COMPTON.  
E. P. COPELAND.  
ISAAC T. RHEA.  
ENOS M. BARTON.

STATE OF INDIANA,

*Vanderburgh County:*

Personally appeared before me the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., E. P. Huston, Paul J. Marrs, M. G. Kellogg and E. T. Baker, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Evansville, Ind., County and State aforesaid, this first day of June, 1883.

[SEAL.]

GEO. S. CLIFFORD,  
*Notary Public, Vanderburgh County, Ind.*

29 STATE OF TENNESSEE,

*County of Davidson, ss:*

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, J. Compton, E. P. Copeland, and Isaac T. Rhea, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Nashville, County and State aforesaid, this second day of June, 1883.

[SEAL.]

H. L. CLAIBORNE,  
*Notary Public.*

## COOK COUNTY,

*State of Illinois, set:*

Personally appeared before me, the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the City of Chicago, in the County and State aforesaid, this the sixth (6) day of June, 1883.

[SEAL.]

WM. S. GRANGER,  
*Notary Public.*

## STATE OF KENTUCKY,

*Henderson County, set:*

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the Cumberland Telephone & Telegraph Company was this day lodged in my office for record, and the same with the foregoing certificates thereon endorsed is with this certificate truly recorded in my office.

Witness my hand this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,  
By THOS. H. BEVERLY, *D. C.*

## 30 STATE OF KENTUCKY,

*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, now of record in my said office. Given under my hand and official seal this 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk*,  
By B. S. POWELL, *D. C.*

(Revenue Stamp.)

At a regular Called Meeting of the Stockholders of the Cumberland Telephone & Telegraph Company of Henderson, Ky., held at the office of the Company in Henderson, Ky., August 15, 1883, the following resolution was passed, viz.:

*Resolved*, That Article 3 of the Articles of Incorporation of this Company be, and it is amended, so as to read as follows:

Article 3. The amount of capital stock authorized is Two Million Seven Hundred Thousand (\$3,700,000) Dollars and may be increased to Three Million- (\$3,000,000) of Dollars by the vote of the Stockholders holding a majority of the stock which may have been issued. Said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers upon the call of the Board of Directors and after twenty days' notice of said call.

E. S. BABCOCK, JR., *President*.

E. T. BAKER, *Secretary*.

STATE OF INDIANA,

*Vanderburgh County, ss:*

Before me, Jno. Lenihan, Jr., a Notary Public in and for said County, on this, 20th day of August, A. D. 1883, personally appeared the above-named E. S. Babcock, Jr., President, and E. T. Baker, Secretary, with whom I am personally acquainted, and acknowledged the execution of the foregoing instrument.

Witness my hand and Notarial seal this date aforesaid.

[SEAL.]

JNO. LENIHAN, JR.,

*Notary Public.*

31 STATE OF KENTUCKY,

*Henderson County, set:*

I, G. W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was this day lodged in my office for record, and that I have recorded it the foregoing, and this certificate, in my said office.

Witness my hand this 22d day of August, 1883.

GEO. W. SMITH, *C. H. C. C.*,By THOS. H. BEVERLY, *D. C.*

STATE OF KENTUCKY,

*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my office.

Given under my hand and seal of office this 30th day of January, 1901.

J. H. HART,

*County Clerk,*By B. L. POWELL, *D. C.*

[SEAL.]

(Revenue Stamp.)

*Amendment to Articles of Incorporation of the Cumberland Telephone and Telegraph Company.*

Adopted at a Meeting of the Stockholders in Henderson, Ky.,  
December 21, 1883.

*Resolved*, That the following be and they are hereby adopted as amendments of the original Articles of Incorporation of the Cumberland Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the Stockholders:

1st. That Article Three (3) of said Articles of Incorporation be and it is hereby amended so as to read as follows:

Article (3). The amount of capital stock authorized is Two Million Seven Hundred Thousand (\$2,700,000) Dollars and may be increased to Three Millions of Dollars (\$3,000,000) by the vote of the Stockholders holding a majority of the stock

which may have been issued. Said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers on call of the Board of Directors and after twenty days' notice of such call. Such notice shall be sufficient if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company; and such vote may be in person or by proxy, properly authorized by written or printed appointment signed by such stockholders.

ELISHA S. BABCOCK, JR.  
 ENOS M. BARTON.  
 MILO G. KELLOGG.  
 ERASTUS P. HUSTON.  
 ELWOOD T. BAKER.  
 ISAAC T. RHEA.  
 J. COMPTON.  
 PAUL J. MARRS.  
 E. P. COPELAND.

Attest:

ANDREW HESS.  
 JNO. J. WARD.

STATE OF TENNESSEE,

*Davidson County, ss:*

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, duly commissioned and qualified, on this 24th day of December, A. D. 1883, Isaac T. Rhea and J. Compton, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 24th day of December, 1883.

[SEAL.]

H. L. CLAIBORNE,  
*Notary Public.*

33 STATE OF INDIANA,

*Vanderburgh County, set:*

Personally appeared before me, the undersigned Notary Public in and for said County and State, duly commissioned and qualified, on this 21st day of December, A. D. 1883, Elisha S. Babcock, Jr., Enos M. Barton, Milo G. Kellogg, E. P. Huston, and E. T. Baker, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 21st day of December, 1883.

[SEAL.]

J. W. NEESEN,  
*Notary Public, V. C.*

STATE OF LOUISIANA,  
*City of New Orleans:*

Personally appeared before the undersigned authority, the above-named Paul J. Marrs and Elijah Percy Copeland, with both of whom I am personally acquainted, and who severally acknowledged that they executed the foregoing instrument for the purposes therein contained.

In faith whereof, I have hereto set my hand and affixed my seal as a qualified Notary Public of and for the Parish of New Orleans, Louisiana, at New Orleans, in the twenty-seventh day of December, A. D. 1883.

[SEAL.]

ANDREW W. HERD,  
*Notary Public.*

STATE OF KENTUCKY,  
*Henderson County, set:*

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was this day lodged in my office for record, and that I have recorded it the foregoing, and this certificate, in my said office.

Witness my hand, this January 1st, 1884.

GEO. W. SMITH, *C. H. C. C.*,  
By THOS. H. BEVERLY, *D. C.*

STATE OF KENTUCKY,  
*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument now of record in my said office.

Given under my hand and official seal this 30th day of January, 1901.

J. H. HART,  
*County Clerk,*  
By B. L. POWELL, *D. C.*

[SEAL.]

(Revenue Stamp.)

34 *Amendment to Articles of Incorporation of the Cumberland Telephone and Telegraph Company.*

Whereas, The Cumberland Telephone & Telegraph Company, having its principal place of business at Henderson, in Henderson County, State of Kentucky, U. S. A., adopted Articles of Incorporation under the general statutes of said State, dated June 8, 1883, and also subsequently adopted amendments thereof and thereto, dated December 21, 1883, said Articles original and amendatory having been executed, acknowledged and published and recorded, as required by the said laws of the said State. And whereas, the said Company, having duly organized under said Articles, has been operating and doing business thereunder and as therein provided



ever since. And whereas, it was deemed to the best interest of the Company that the Board of Directors be increased from nine to twelve members, and with a view thereto and for the purpose of increasing the same at the regular annual meeting of the stockholders of the said Company, held on the 14th day of May, 1889, in Henderson County, Kentucky. Pursuant to the by-laws of the Company and upon due notice to the stockholders of said Company thereof, the following resolution was proposed for adoption to said meeting, viz.:

*Resolved*, That Article 6 of the Articles of Incorporation adopted by this Company, dated June 8, 1883 (amended December 21, 1883), and under which it is now operating, be amended and changed so as to be and to read as follows, viz.:

The affairs of said Company are to be controlled by a Board of twelve Directors, and a President and a Vice President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of four members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing, the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires in accordance with the by-laws of the corporation. Should there, from any cause, be a failure to elect on said day, then they may be elected at any regular meeting thereafter or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

*Resolved, further*, That the President and Secretary of this Company be, and they are hereby, instructed and directed for and in the name of this Company to execute, acknowledge, and perfect this amendment in due and proper form, as required in such cases, as the deed and act of this corporation, and that the same be executed and acknowledged, published and recorded by them as soon as practicable. And, whereas, said resolution was adopted and approved by a vote of Fifteen Thousand One Hundred and Twenty-nine (15,129) shares, the same being more than a majority of all the shares and votes of the stockholders of said Company, and none opposing, as appears by the recorded vote and minutes of said proceedings. Now, in accordance therewith, the said Cumberland Telephone & Telegraph Company, through W. M. Duncan, the President of the same, and Jno. Lenihan, the Secretary thereof, as such, for and on behalf of said Company and the stockholders thereof, do hereby adopt the said amendment hereinbefore set forth in said Resolutions as a part of the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, to be as effective and controlling as if it were part of the original.

In witness whereof, the said W. M. Duncan, as President aforesaid, and the said Jno. Lenihan, as Secretary aforesaid, have hereto



attached the name and seal of the said Cumberland Telephone & Telegraph Company, and also their own signatures as President and Secretary executing the same.

Done at Henderson, Henderson County, Kentucky, on this, the 14th day of May, A. D. 1889.

[SEAL.]

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

By W. M. DUNCAN, *President, and*

By JNO. LENIHAN, *Secretary.*

W. M. DUNCAN, *President.*

JNO. LENIHAN, *Secretary.*

36 STATE OF KENTUCKY,  
*Henderson County, act:*

I, G. W. Smith, Clerk of the County Court in and for the County and State aforesaid, do certify that the foregoing Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my office and acknowledged before me by W. M. Duncan, as President of said Company, and by Jno. Lenihan, Secretary of said Company, to be their act and deed, and the same is, with this certificate, truly recorded in my office.

Witness my hand, this 14th day of May, 1889.

GEO. W. SMITH, *C. H. C. C.*

STATE OF KENTUCKY,  
*Henderson County, act:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my said office.

Given under my hand and official seal, this 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk,*  
By B. L. POWELL, *D. C.*

(Revenue Stamp.)

*Articles of Incorporation of the Great Southern Telephone and Telegraph Company.*

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (53), 1561, of the General Statutes of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles hereinafter expressed:

37 Article 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Great Southern Telephone & Telegraph Company. Its principal place of business is in the City and County of Henderson, State of Kentucky.

Article 2. The general nature of the business proposed to be transacted is the erecting, maintaining, and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges, and district telegraph and messenger systems.

Article 3. The amount of capital stock authorized is not less than Seven Hundred Thousand Dollars, and may be increased to Ten Millions of Dollars divided into shares of One Hundred Dollars each, and, is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

Article 4. The existence of said corporation commences on the 8th day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount and a majority in the number of the stockholders.

Article 5. The affairs of said Company are to be controlled by a Board of nine Directors, and a President and Vice President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively, of three members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Witness our hands, this eighth day of June, 1883.

ELISHA S. BABCOCK, JR.

PAUL J. MARRS.

MILO G. KELLOGG.

ENOS M. BARTON.

38      STATE OF INDIANA,  
            *Vanderburgh County:*

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., Paul J. Marrs, and M. G. Kellogg, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereby sign my name and affix my seal of office in the City of Evansville, State and County aforesaid, this 1st day of June, 1883.

[SEAL.]

GEO. S. CLIFFORD,

*Notary Public, Vanderburgh County, Ind.*

STATE OF ILLINOIS,

*Cook County:*

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereto sign my name and affix my seal of office in the City of Chicago, State and County aforesaid, this 2d day of June, 1883.

[SEAL.]

WM. G. GRANGER,  
*Notary Public.*

STATE OF KENTUCKY,

*Henderson County, sct:*

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the Great Southern Telephone & Telegraph Company was this day lodged in my office for record, and the same, with this and the foregoing certificates, is truly recorded in my said office.

Witness my hand, this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,  
By THOS. H. BEVERLY, *D. C.*

STATE OF KENTUCKY,

*Henderson County, sct:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my said office.

Given under my hand and official seal, this 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk*,  
By B. L. POWELL, *D. C.*

(Revenue Stamp.)

39 At a Regular Called Meeting of the stockholders of the Great Southern Telephone & Telegraph Company, of Henderson, Ky., held at the office of the Company in Henderson, Ky., August 15, 1883, the following Resolution was passed, viz.:

*Resolved*, That Article Three (3) of the Articles of Incorporation of this Company be, and it is amended, so as to read as follows:

Article Three (3). The amount of capital stock authorized is Two Millions of Dollars, and may be increased to Ten Millions of Dollars by the vote of the stockholders holding a majority of the stock which may have been issued. Said stock shall be divided into shares of One Hundred Dollars Each, and shall be paid in by the subscribers upon the call of the Board of Directors and after twenty days' notice of said call.

E. S. BABCOCK, JR., *President*.

E. T. BAKER, *Secretary*.

STATE OF INDIANA,  
*Vanderburgh County, ss:*

Before me, Jno. Lenihan, Jr., Notary Public in and for said County, on this 20th day of August, A. D. 1883, personally appeared the above-named E. S. Babcock, Jr., President, and E. T. Baker, Secretary, with whom I am personally acquainted, and acknowledged the execution of the foregoing instrument.

Witness my hand and notarial seal the date aforesaid.

[SEAL.]

JNO. LENIHAN, JR.,  
*Notary Public.*

STATE OF KENTUCKY,  
*Henderson County, sc:*

I, G. W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was this day lodged in my office for record, and that I have recorded it the foregoing, and this certificate, in my said office.

Witness my hand, this the 22d day of August, 1883.

GEO. W. SMITH, *C. H. C. C.*,  
 By THOS. H. BEVERLY, *D. C.*

STATE OF KENTUCKY,  
*Henderson County, sc:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my said office.

Given under my hand and official seal this 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk*,  
 By B. L. POWELL, *D. C.*

(Revenue Stamp.)

40      *Amendment to Articles of Incorporation of the Great  
 Southern Telephone & Telegraph Company.*

Adopted at a Meeting of the Stockholders of said Company in the City of Henderson, Ky., on the 21st Day of December, 1883.

(1) *Resolved*, That the following be and they are hereby adopted as Amendments of the Original Articles of Incorporation of the Great Southern Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the stockholders:

(1) That Article Three (3) of said Articles of Incorporation be, and it is hereby, amended so as to read as follows:

Article Three. The amount of capital stock authorized is Two Millions of Dollars, and may be increased to Ten Millions of Dollars by the vote of the stockholders holding a majority of the stock which may have been issued. The said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the sub-

scribers upon call of the Board of Directors, and after twenty days' notice of such call. Such notice shall be sufficient if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders, each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company, and such vote may be in person or by proxy, properly authorized by written or printed appointment, signed by such stockholder.

SAM'L BAYARD.  
ROBERT K. DUNKERSON.  
ELISHA S. BABCOCK, JR.  
MILO G. KELLOGG.  
ERASTUS PERRY HUSTON.  
ENOS M. BARTON.  
PAUL J. MARRS.  
EDWARD T. BAKER.  
WILLIAM D. BABCOCK.

41 STATE OF NEW YORK,  
*City and County of New York:*

On this twenty-ninth day of December, one thousand eight hundred and eighty-three, before me, a Notary Public in and for said City and County, personally came William D. Babcock, to me known, and known to me to be one of the persons who signed the foregoing Resolution, and he duly acknowledged that he subscribed the same for the purposes therein expressed.

Witness my hand the day and year last above mentioned.

[SEAL.]

M. H. DILLENBECK.

*Notary Public, City and County, New York.*

STATE OF KENTUCKY,  
*Henderson County, set:*

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was produced to me in my county on December 21, 1883, and acknowledged by Samuel Bayard, Robert K. Dunkerson, Elisha S. Babcock, Jr., Milo G. Kellogg, Erastus Perry Huston, Enos M. Barton, Paul J. Marrs, and Edward T. Baker, to be their act and deed, and the same is with this and for the foregoing certificate truly recorded in my office.

Witness my hand, this 7th day of January, 1884.

[SEAL.]

GEO. W. SMITH, C. H. C. C.,

By T. H. BEVERLY, D. C.

STATE OF KENTUCKY,  
*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my said office.

Given under my hand and official seal, this 30th day of January, 1901.

[SEAL.]

J. H. HART, Clerk,  
By B. L. POWELL, D. C.

(Revenue Stamp.)

42     *Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company.*

Whereas, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, and the Great Southern Telephone & Telegraph Company, of Henderson, Henderson County, Kentucky, are corporations, organized and chartered under and by virtue of the laws of the Commonwealth of Kentucky with power, each, to do a telephone and telegraph business, either or both, and are each now engaged in the telephone business; and

Whereas, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, and the northern part of the State of Mississippi, and the business done by and the lines, exchanges, toll-stations, etc., of the Great Southern Telephone & Telegraph Company are exclusively in Louisiana, and the southern, middle and western parts of Mississippi; and,

Whereas, Neither of said Companies, in Kentucky or elsewhere, own or operate competing lines, exchanges, or toll-stations or any line or structure parallel or competing with any line or structure of the other Company; and,

Whereas, It is desired to be to the advantage and interest of said Companies and their stockholders that they should be consolidated, and their lines and systems connected and extended as one system; and the Directors of both Companies, or a majority of the Directors of each Company have agreed upon terms of consolidation;

Now, to effectuate the same, the said Cumberland Telephone & Telegraph Company, and the Great Southern Telephone & Telegraph Company, do hereby agree upon, enter into, and make

43     and form these Articles of Incorporation or Consolidation, namely:

*First.* The said two corporations do now hereby consolidate and become one corporation under, and by the name of "Cumberland Telephone & Telegraph Company," and

*Second.* The principal office or place of business of this corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and

*Third.* The business of this Company shall be the same as that of the consolidating Companies, parties hereto, namely; to conduct the telephone and telegraph business, either or both, and with power to own, acquire, and operate, all lines, exchanges, toll-stations, and offices and other property necessary or proper for the efficient conduct of its said business; and

*Fourth.* The capital stock of this Company shall be Three Mil-

lion Dollars in the aggregate, divided into thirty thousand shares (30,000) of One Hundred (\$100) Dollars each; and

*Fifth.* The stockholders of the two consolidating Companies shall be the stockholders of this Company, and their respective interests and holdings shall be as follows: For each and every share (now one hundred dollars each) of and in the Cumberland Telephone & Telegraph Company, now issued and outstanding, and which aggregate 16,957 shares, or \$1,695,700, the owners and holders thereof shall be entitled to, and shall receive, one share of and in the capital stock of this Company, and in the aggregate 16,957 shares, amounting to \$1,695,700; and for every two shares (which shares are now one hundred (\$100) dollars each) of and in the Great Southern Telephone & Telegraph Company, now issued and outstanding, and which aggregate 18,917 shares, amounting to \$1,891,700, the owners, as holders thereof, shall be entitled to, and shall receive, one share of and in the capital stock of this Company, or 9,458½ shares of the stock of this consolidated Company, aggregating \$945,850. Certificates in due and proper form shall be issued and delivered, upon the surrender and delivery up for cancellation of the old or outstanding certificates.

*Sixth.* The shares to which the owners and holders of the stock of and in the Great Southern Telephone & Telegraph Company, are, or may be entitled hereunder, and the certificates issuable therefor, shall be issued and received and taken, subject to the following provisions and conditions, viz.: Lawsuits are now pending in the courts of the State of Louisiana, wherein and whereby the said Great Southern Telephone & Telegraph Company is sought to be held

44 liable for a large amount of back taxes, alleged to be due from said Company to said State, and minor divisions thereof, parishes, municipal corporations, etc., and which litigation is pending undetermined; now, if these suits shall be determined adversely to the said Great Southern Telephone & Telegraph Company, and it shall be held liable for said taxes, or any part thereof, sought to be collected either in said suits, or any other hereafter to be instituted, or renewals thereof, in the event any of the present suits fail upon some ground not going to the merits, and new suits shall be instituted upon the same demands, then, and in such event or events, the holders of said shares and certificates (9,458½) for \$945,850 shall not be entitled to, neither shall any of them receive, any dividends which shall or may be declared upon the stock of this Company at, or for, any of the four quarters next in order following the determination of the liability aforesaid, but the amounts to which such shareholders would otherwise be entitled as dividends so declared, shall be and become the property of this consolidated company, and shall be passed to its credit; but it shall pay such back-tax judgments and decrees, in consideration thereof.

After the four quarterly dividend days have passed, the payment of the succeeding dividends to the said stockholders shall be resumed, whether said four quarterly dividends so retained shall suffice to pay said decrees or judgments, or not; and,

*Seventh.* The officers by whom the affairs of this Company shall be conducted, the times and places of their election, the duration



of this Company, or its period of existence, the highest amount of indebtedness which it shall incur, and the non-liability of its stockholders for the corporate indebtedness, shall be as now provided by the Articles of Incorporation of the consolidating Companies, under the laws of the Commonwealth of Kentucky, subject to the modifications resulting from an increase of the capital stock from an aggregate of \$2,700,000 of capital stock, to \$3,000,000; and,

*Eighth.* This agreement shall not be effectual, nor the consolidation complete or valid, until it shall have been consented to in writing by the owners of at least two-thirds of the said capital stock of each of said consolidating Companies, or corporations, obtained and given as is required by the laws of the Commonwealth of Kentucky in case of the proposed consolidation of two or more corporations; and,

*Ninth.* The written consent of said stockholders, that is to say, the writings evidencing the same, shall be all delivered up  
45 and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notice required by law to be given to the stockholders of their respective companies, was given as required by law, and that the said written evidences of consent so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders so consented; and,

*Tenth.* The certificates of the officer, or Notary Public taking the acknowledgement of the officers and directors of the consolidating Companies hereto, for the purposes of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths in writing, provided for in the Ninth Article hereof, have been filed with, and are in the custody and possession of the President and Secretary of the Cumberland Telephone & Telegraph Company.

*Eleventh.* The officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company shall be the officers, directors, and managing agents of and for this consolidated Company until the next regular election, according to the laws, by-laws, and charter of the said (consolidating) Cumberland Telephone & Telegraph Company, and shall, as the officers, directors, and managing agents of the said Company, conduct the business; and,

*Twelfth.* Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities of this corporation and the rights and duties of its stockholders shall be as prescribed by the laws of the Commonwealth of Kentucky.

*In Witness Whereof,* the Cumberland Telephone & Telegraph Company has caused its name and corporate seal to be affixed by James E. Caldwell, its President, and Leland Hume, its Secretary, and these articles to be subscribed by eight (8) of its eleven directors, on this, the 4th day of March, A. D. 1898; and,



The Great Southern Telephone & Telegraph Company has caused its name and corporate seal to be affixed by A. W. Crandall, its President, and Paul J. Marrs, its Secretary, and these articles to be subscribed by six (6) of its nine directors, on this, the day and date last above written.

(Signed) CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

By JAMES E. CALDWELL,  
*President of the Cumberland Telephone & Telegraph Company.*

[SEAL.] LELAND HUME,  
*Secretary of the Cumberland Telephone & Telegraph Company.*

W. LITTERER,  
E. M. BARTON,  
W. W. PERRY,  
A. G. SHARP,  
V. E. SHWAB,  
HENRY SPERRY,  
M. J. SMITH,  
JAMES E. CALDWELL,  
*Directors of the Cumberland Telephone & Telegraph Company.*

GREAT SOUTHERN TELEPHONE & TELEGRAPH COMPANY,

By A. W. CRANDALL,  
*President Great Southern Telephone & Telegraph Company, and*

[SEAL.] By PAUL J. MARRS,  
*Secretary Great Southern Telephone & Telegraph Company, and*

By JOHN N. BOFINGER,  
A. W. CRANDALL,  
FRANK B. KNIGHT,  
W. H. BOFINGER,  
E. M. BARTON,  
PAUL J. MARRS,

*Directors Great Southern Telephone & Telegraph Company.*

STATE OF TENNESSEE,

*County of Davidson, set:*

I, Ed. V. Jones, Notary Public in and for State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose

signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or

Articles of Consolidation, and they, being by me duly and  
47 severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the Cumberland Telephone & Telegraph Company, is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and

They did severally further make oath and say that the owners of 14,632 shares of the stock of said consolidating Cumberland Telephone & Telegraph Company did approve of and consent to the consolidation aforesaid of the said Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company in writing, and that said writings or written consents are now on file with them, and in their custody and possession as President and Secretary of the Cumberland Telephone & Telegraph Company for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 16,957 shares, and no more, and that the said 14,632 shares held by consenting owners, is more than two-thirds thereof; and

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in the *Hopkinsville New Era*, a newspaper printed and circulating therein, said County being the principal place of said Company's business, and that the said notice was published as aforesaid more than two weeks previous to entering into the said agreement and executing said articles of Consolidation; and they did severally make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants James E. Caldwell and Leland Hume, as President and Secretary of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and

The said James E. Caldwell and the said Leland Hume, also then, this day, severally acknowledged the within instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and I do further certify that Henry

48 Sperry, M. J. Smith, James E. Caldwell, William Litterer, E. M. Barton, W. W. Berry, A. G. Sharp, V. E. Shwab, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the

Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve members, and no, more, and that eight members is a majority of a full board, and that they as Directors of said Company, signed and executed the foregoing instrument or articles, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 4th day of March, 1898.

[SEAL.]

ED. V. JONES,  
*Notary Public.*

My Commission expires January 1, 1900. Notary Public for Davidson County, Tenn.

STATE OF KENTUCKY,  
*County of Henderson, set:*

I, J. L. Kimmel, a Notary Public, in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named, A. W. Crandall, President of the Great Southern Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Paul J. Marrs, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they being by me duly and severally sworn, did severally depose and say, that the said A. W. Crandall was, and is, the President of the said Great Southern Telephone & Telegraph Company, and that the said Paul J. Marrs was, and is, the Secretary thereof; and

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said Great Southern Telephone & Telegraph Company, is such seal; and

49 That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of said Company to said instrument; and

They did severally further make oath and say that the owners of 18,274 shares of the stock of said consolidating Great Southern Telephone & Telegraph Company did approve of, and consent to, the consolidation aforesaid of the Cumberland Telephone & Telegraph Company, and the Great Southern Telephone and Telegraph Company, in writings, and that said writings or written consents are now on file with them, and in their custody and possession as President and Secretary of the Great Southern Telephone & Telegraph Company for the said Company, and that the capital stock

issued and outstanding, of the said consolidating Company, the Great Southern Telephone & Telegraph Company, is 18,917 shares, and no more, and that the said 18,274 shares held by consenting owners, is more than two-thirds thereof; and

They did also then further and severally make oath and say, that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein, and that such notice was also published in the *Henderson Journal*, a newspaper printed and circulated in Henderson County, said county being the principal place of said Company's business, and that the said notice was published as aforesaid, more than two weeks previous to entering into the said agreement and executing said Articles of Consolidation; and

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants, A. W. Crandall and Paul J. Marrs, as President and Secretary of said Great Southern Telephone & Telegraph Company, were by them delivered to and filed with, and are in the custody and possession of, said James E. Caldwell and Leland Hume, as President and Secretary of the Cumberland Telephone & Telegraph Company for such corporation; and

The said A. W. Crandall and the said P. J. Marrs also then, this day, severally acknowledged the within instrument to be the act and deed of said Great Southern Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company; and

I do further certify that A. W. Crandall, F. B. Knight, Jno. N. Bofinger, W. H. Bofinger, E. M. Barton, and P. J. Marrs, with each of whom I am personally acquainted, this day also did personally appear before me, and make oath and say, respectively, that they are Directors of the above named consolidating corporation, the Great Southern Telephone & Telegraph Company; that the Board of Directors now consists of nine members, and no more, and that six is a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument, or articles; and that they severally acknowledge the said instrument to be the act and deed of said Great Southern Telephone & Telegraph Company, and to be their act and deed as Directors of said Company for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of office, at my office, in Henderson County, Kentucky, on this, the 3d day of March, 1898.

My commission expires January 29, 1900.

[SEAL.]

J. L. KIMMEL,

*Notary Public for Henderson County, Ky.*

STATE OF KENTUCKY,

*Christian County, act:*

I, John P. Prowse, Clerk of the Christian County Court, do certify that the foregoing Articles of Consolidation, of the Cumberland

Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, were this day produced to me in my office with the foregoing certificates thereon endorsed, whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificates, has been duly recorded in my office, this, March 11, 1898.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,

*Henderson County, act:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing Articles of Consolidation, of the Cumberland Telephone & Telegraph Company, and the Great Southern Telephone & Telegraph Company, was this day lodged in my office for record, and that I have recorded it, the foregoing, and this certificate, in my said office.

Given under my hand, this, March 16, 1898.

J. H. HART,

*Clerk Henderson County Court.*

51 STATE OF KENTUCKY,

*Henderson County, act:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my office.

Given under my hand and official seal, this, 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk,*

By B. L. POWELL, *D. C.*

(Stamp.)

*Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.*

Statement and Amendment.

STATE OF KENTUCKY,

*Christian County, act:*

Whereas, At the annual meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office, in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a Resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the thirty thousand shares of the capital stock of said Company, and which resolution was, and is, as follows, viz.:

*Resolved,* That the capital stock of this Company, which is now 30,000 shares of One Hundred Dollars (\$100) each, aggregating

Three Millions of Dollars (\$3,000,000), be increased to sixty thousand (60,000) shares, of One Hundred (\$100) each, so as, after such increase, to aggregate Six Millions of Dollars (\$6,000,000) in all; and, be it further

*Resolved*, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore,

but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the authorized capital stock of the Company at the time," and be it further

*Resolved*, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby, authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and proper Statement and Amendment, to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given, as, and in manner and form as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said Resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors, of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, and execute, under the seal of the Company, and acknowledge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and, Geo. R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, A. G. Sharp, Wm. Litterer, James E. Caldwell, Henry Sperry, being eight of the twelve Directors, constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March 4, 1898, and were recorded March 11, 1898, in Book of Articles of Incorporation No. One, pages 323, to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898, have been and are hereby amended in accordance with the said Resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

53 "The capital stock of this Company shall be Six Millions of Dollars (\$6,000,000) in the aggregate, divided into sixty thousand (60,000) shares of One Hundred Dollars (\$100) each," and so that the said Seventh Article of the said Articles of Consolidation shall have added thereto the following Amendment, and modification, viz.:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

*In Witness Whereof*, we, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this, the 3d day of March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899).

[SEAL.]

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

By JAMES E. CALDWELL, *President, etc.*

Attest:

LELAND HUME, *Secretary.*

W. LITTERER,  
A. G. SHARP,  
HENRY SPERRY,  
M. J. SMITH,  
V. E. SHWAB,  
W. W. BERRY,  
GEO. R. KNOX,

*Directors of the Cumberland Telephone & Telegraph Company.*

STATE OF TENNESSEE,

*Davidson County, set:*

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally  
54 depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Tele-



graph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument, and,

They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is thirty thousand (30,000) shares, and no more, and that the said 25,014½ shares held by the said consenting owners are more than two-thirds thereof, and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company, and for the purpose therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, V. E. Shwab, Henry Sperry, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company for the purposes therein expressed.

55 In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the third day of March, A. D. 1899.

[SEAL.]

ED. V. JONES,

*Notary Public for Davidson County, Tennessee.*

My seal of office expires on the 1st day of 1900.

STATE OF KENTUCKY,

*Christian County, set:*

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify that the foregoing statement and Amendment of Articles of Incorporation, of the Cumberland Telephone



& Telegraph Company, was this day produced to me in my county with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this March 4, 1899.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,

*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing statement and Amendment of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day lodged in my office for record, and that I have recorded it, the foregoing, and this certificate, in my said office.

Given under my hand, this 6th day of March, 1899.

JNO. H. HART, *Clerk.*

By B. L. POWELL, *D. C.*

STATE OF KENTUCKY,

*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing is a true copy of an instrument of writing now of record in my said office.

Given under my hand and official seal, this 30th day of January, 1901.

[SEAL.]

J. H. HART, *Clerk.*

By B. L. POWELL, *D. C.*

(Stamp.)

56 STATE OF KENTUCKY,

*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, and keeper of records thereof, do hereby certify that the foregoing are true and perfect copies of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company and the Amendments thereto, and the Articles of Incorporation of the Great Southern Telephone & Telegraph Company and the Amendments thereto, and the Articles of Consolidation of the said Companies and the Amendment of the Articles of Consolidation or Incorporation of the said (consolidated) Cumberland Telephone & Telegraph Company, as the same now appears of record in my office.

*In Witness Whereof*, I have hereunto set my hand and affixed my seal of office, at my office in said county on this, the eleventh day of February, A. D. 1901.

[SEAL.]

J. H. HART, *Clerk.*

STATE OF KENTUCKY,

*Office of Secretary of State, set:*

I, C. B. Hill, Secretary of State, of the Commonwealth of Kentucky, do hereby certify that J. H. Hart, whose genuine signature

appears to the foregoing certificate, was at the said time and date the Clerk of the Henderson County Court, of Henderson County, Commonwealth of Kentucky; that he was then the proper officer to make the said certificate; that it is the due and proper form, and that full faith and credit should be given thereto.

*In Witness Whereof*, I have hereunto set my hand and affixed my seal of office on this, the — day of February, A. D. 1901, and in the 109th year of the Commonwealth of Kentucky.

[SEAL.]

C. B. HILL,  
*Secretary of State.*

*An Act to Incorporate the Ohio Valley Telephone Company.*

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1st. That James B. Speed, James Clark, H. N. Gifford, William H. Johnson, J. M. Brown, William H. Newman, and A. P. Speed, their associates, successors and assigns, be, and they hereby are, made a body corporate, with the name, The Ohio Valley Telephone Company, and as such corporation may sue and be sued, enter into contracts and have and exercise all such powers and privileges as usually appertain to corporations. That the corporators named in this section shall act as directors until their successors are elected and qualified; and in the event of the failure of any of said corporators to act, their vacancies shall be filled by election by those acting.

2d. The capital stock of said Company shall be Five Hundred Thousand Dollars (\$500,000), with the right to increase the same to One Million Dollars (\$1,000,000), divided into shares of One Hundred Dollars (\$100) each, which shall be personal property, and evidenced by the certificates of the Company under its seal, and shall be transferable only on the books of the Company. Transfers of stock shall not be valid except as between the parties thereto until the same are regularly entered upon the books of the Company as aforesaid; and the said stock shall be paid in such manner and under such conditions as the Board of Directors may prescribe.

3d. The said corporators above named and their survivors, or a majority of them, may receive subscriptions to the capital stock of said Company, payable at such time, place, and manner as may be specified in such subscription; and said Company may organize for business when Three Hundred Thousand Dollars (\$300,000) of stock shall have been subscribed.

4th. Said Company shall have the power to purchase, construct, maintain, and operate, within this State and elsewhere, telephone lines, exchanges, and systems, and to conduct all the business incident and pertaining thereto, and may purchase or acquire and dispose of real estate, machinery, apparatus, poles, wires, patents or interests therein, licenses, rights, and franchises relating to such business or to be used by said Company therefor; and said Company may manufacture or buy, sell, or lease any machinery, devices, patents, or interests therein, licenses, and supplies.

5th. The said Company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the City of Louisville, with and by the consent of the General Council of said city; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed upon, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents, or interests therein, equipments, rights of way, easements and servitudes, in highways, streets, and alleys in the City of Louisville, together with all of its properties; and when purchased or leased, shall have the power to maintain and operate the same along, over, or under the highways, streets, and alleys in the said City of Louisville -vided, however, that such telephone poles, lines, and systems have heretofore been granted the right of way or easements in the highways, streets, and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip, and maintain telephone lines along, over, or under the highways, streets, and alleys, and across any watercourse within this Commonwealth, so as not to obstruct the same; and said Company may connect its lines with those of any other Company, on such terms as may be agreed upon.

6th. The said Company is authorized to borrow money, and may issue and sell its negotiable coupon bonds, not exceeding one-fourth of the capital stock in existence at the time of issuing such bonds, payable at such times and places, and bearing such rate of interest, not exceeding (6) per cent per annum, payable semi-annually, as may by said Company be determined, and may secure the payments of same by mortgage or deed of trust on all the property of the Company, real, personal, or mixed, and on any or all of its patents, licenses, franchises, easements, rights of way, privileges, rents, poles, and apparatus, with such terms and conditions as may be expressed therein.

7th. The principal office of said Company shall be in Louisville, Ky., and the management and administration of the affairs of the said Company shall be by a Board of Directors of not less than three (3) nor more than nine (9), to be elected by the stockholders once in every year, as may be prescribed in the by-laws, and said Directors shall hold their offices until their successors are elected and qualified; and the Directors may elect a President, Vice President, Secretary and Treasurer, and General Manager, and may appoint such other officers and agents as they may deem necessary, and may prescribe their duties and compensation, and require of them bond, with security thereon, for the faithful performance of their duties, and remove them and appoint others at pleasure; may fill vacancies that may occur in the Board, may make by-laws for the government of the Company, alter, amend, or abolish the same, at any meeting of said subscribers or stockholders of said Company. Each person shall be entitled to one vote for each share of stock standing in his name on the books of the said Company, and may cast his vote in person or by proxy.

8th. This Act shall take effect and be in force from its passage.  
Approved April 3, 1886.

59      *Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.*

Statement and Amendment.

STATE OF KENTUCKY,  
*Christian County, sct:*

Whereas, At the annual meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a Resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the thirty thousand shares of the capital stock of said Company, and which Resolution was, and is, as follows, viz.:

*Resolved*, That the capital stock of this Company, which is now 30,000 shares of \$100 each, aggregating Three Millions of Dollars, be increased to sixty thousand (60,000) shares, of One Hundred (\$100) Dollars each, so as after such increase, to aggregate Six Millions of Dollars in all; and, be it further

*Resolved*, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore, but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the authorized capital stock of the Company at the time;" and be it further

*Resolved*, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and  
60      proper Statement and Amendment, to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given as, and in manner and form as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said Resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, and execute, under the seal of

the Company, and acknowledge the Statement and Amendment necessary to carry said Resolution into effect,

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and G. R. Knox, A. G. Sharp, W. W. Berry, Wm. Litterer, V. E. Shwab, James E. Caldwell, M. J. Smith, Henry Sperry, being eight of the twelve Directors constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March 4, 1898, and were recorded March 11, 1898, in "Book of Articles of Incorporation" No. One, pages 323 to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898, have been and are hereby amended in accordance with the said Resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Six Millions of Dollars in the aggregate, divided into sixty thousand shares of One Hundred Dollars each," and

So that the Seventh Article of the said Articles of Consolidation shall have added thereto, the following Amendment, and modifications, viz.:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

61 *In Witness Whereof*, we, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this, the 3d day of March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899).

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

By JAMES E. CALDWELL, *President, etc.*

Attest:

LELAND HUME, *Secretary.*

A. G. SHARP,  
W. LITTERER,  
HENRY SPERRY,  
M. J. SMITH,  
V. E. SHWAB,  
W. W. BERRY,  
GEO. R. KNOX,

*Directors of the Cumberland Telephone & Telegraph Company.*

## STATE OF TENNESSEE,

*Davidson County:*

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument, and,

62 They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is thirty thousand shares, and no more, and that the said 25,014½ shares held by the said consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said company, and for the purposes therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, Henry Sperry, V. E. Shwab, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now

consists of twelve Directors, and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on the third day of March, A. D. 1899.

[SEAL.]

ED. V. JONES,

*Notary Public for Davidson County, Tennessee.*

My seal of office expires on the 1st day of 1900.

63 STATE OF KENTUCKY,  
*Christian County, set:*

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing statement and Amendment of the Articles of Incorporation, of the Cumberland Telephone & Telegraph Company, was this day produced to me in my county with the foregoing certificate, thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this, March 4, 1899.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,  
*Henderson County, set:*

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing Statement and Amendment of the Articles of Incorporation of Cumberland Telephone & Telegraph Company, was this day lodged in my office for record, and that I have recorded it, the foregoing, and this certificate, in my said office.

Given under my hand this, 6th day of March, 1899.

J. H. HART, *Clerk,*

By B. S. POWELL, *D. C.*

*Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company.*

#### Articles of Consolidation.

Whereas, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, a corporation with a capital stock fixed at Six Millions of Dollars, and the Ohio Valley Telephone Company, of Jefferson County, State of Kentucky, a corporation with a capital stock fixed at One Million Dollars, are corporations organized and chartered under, and by virtue of the laws of the Commonwealth of Kentucky, each with power to do a tele-



phone and telegraph business, either or both, and are each now engaged in said business; and,

64       Whereas, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, Mississippi, and Louisiana; and the business done by, and the lines, exchanges, toll-stations, etc., of the Ohio Valley Telephone Company, are exclusively in Kentucky and Indiana, at Louisville, New Albany, Jeffersonville, and vicinity; and,

Whereas, Neither of said Companies own or operate competing lines, exchanges, or toll-stations, or any line or structure parallel or competing with any line or structure of the other company, in Kentucky, or elsewhere; and,

Whereas, it is deemed to be to the advantage and interest of said companies, and their stockholders, that they should be consolidated, and their lines and systems connected and extended so as to be one system, and the Directors of both companies or a majority of the Directors of each, have agreed upon terms of consolidation; and,

Whereas, At regularly and duly held meetings of the stockholders, of each of the said consolidating companies, the owners and holders of more than two-thirds of the capital stock of each of the said companies, respectively, approved of, and directed this consolidation; and consented thereto in writing, and directed the same to be effected.

Now, to effectuate the same, the said Cumberland Telephone & Telegraph Company, and the Ohio Valley Telephone Company, do hereby agree upon, enter into, and make and form, these Articles of Incorporation and Consolidation, Namely:

*First.* The said two Companies do hereby consolidate and become one corporation under, and by the name of "Cumberland Telephone & Telegraph Company," and,

*Second.* The principal office or place of business of this consolidated corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and,

*Third.* The business of this Company shall be the same as that of the consolidated Companies, parties hereto, namely: to conduct the telephone and telegraph business, either or both, and it shall have power to own, acquire, and operate all lines, exchanges, toll-stations, real estate, and buildings, and all other property, necessary and proper for the efficient conduct of its business; and,

65       *Fourth.* The capital stock of this Company shall be Ten Million Dollars in the aggregate, divided into one hundred thousand shares of One Hundred Dollars each; and,

*Fifth.* The stockholders of the two consolidating Companies shall be stockholders hereof, and in this consolidated Company, to the extent of their respective interests and holdings therein, as follows:

For each and every share (now One Hundred Dollars each) of, and in, the Cumberland Telephone & Telegraph Company, now issued and outstanding, the owners and the holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company; and for each and every share (now One Hundred Dollars each) of, and in, the Ohio Valley Telephone Company, now

issued and outstanding, the owners and holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company.

Certificates in due and proper form shall be issued and delivered to them upon the surrender and delivery up for cancellation of the old, or outstanding, certificates now held by the said shareholders of the consolidating Companies. The remainder of the shares of, and in the said capital stock of the consolidated Companies shall be held, to be disposed of as required by law, for the use and benefit of this Company; and,

*Sixth.* This Company shall commence or begin, to exist on the day that these Articles of Incorporation shall be filed and recorded in the office of the Secretary of the State of Kentucky, and it shall continue to exist for the period of two hundred years from and after said date; and,

*Seventh.* This Company may issue negotiable bonds, and secure the same by mortgages and deeds of trust, to an amount in the aggregate, outstanding at any one time, not exceeding the amount of the authorized capital stock of the Company; and may also incur indebtedness not evidenced by negotiable, trust, or mortgage bonds, to an amount not forbidden by the by-laws of the Company; but the private property of the stockholders shall not be subject to the payment of any obligation or indebtedness of this corporation; and,

*Eighth.* The officers of this corporation shall be: a President, and not more than two Vice Presidents, a Secretary, a Treasurer and a

66 Board of Directors, to be composed of as many members as the Company may from time to time prescribe, and such subordinate executive committees, and managers, and agents, as this Company, by its by-laws, and from time to time provides; but the business and affairs of the Companies now consolidating shall be managed and conducted by the officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company until the next regular election of said Company, when the officers, directors, and managing agents of this Company shall be elected for such terms as may be fixed by the Company.

*Ninth.* The written consent of the stockholders of the consolidating Companies; that is to say, the writings evidencing the same, shall all be delivered up and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notices and advertisements required by law to be given to the stockholders of their respective Companies, was given as required by law, and that the said written evidences of consent, so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders consented; and,

*Tenth.* The certificates of the officer, or Notary Public, taking the acknowledgment of the officers and directors of the consolidating Companies hereto, for the purpose of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths

in writing, provided for in the Ninth Article hereof, have been filed, and are in the custody and possession of the President and Secretary of the Cumberland Telephone & Telegraph Company.

*Eleventh.* Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities, and powers, and privileges, and franchises of this corporation, and the rights and duties of its stockholders, shall be the same as those of the consolidating Companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations.

*In Witness Whereof*, the Cumberland Telephone & Telegraph Company has caused its name and its corporate seal to be affixed by James E. Caldwell, its President, and by Leland Hume, its Secretary, and these Articles to be subscribed by seven of its Board of eleven Directors on this, the 27th day of January, A. D. 1900; and,

67 The Ohio Valley Telephone Company has caused its name and corporate seal to be affixed by W. W. Berry, its Vice President, and by J. C. Symmes, its Secretary, and these Articles to be subscribed by four of its Board of five Directors, on this, the day and date last above written.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

By JAMES E. CALDWELL,

*President of the Cumberland Telephone & Telegraph Company, and*

By LELAND HUME,

*Secretary of the Cumberland Telephone & Telegraph Company, and*

By ALONZO G. SHARP,

[SEAL.]

GEO. R. KNOX,

W. W. BERRY,

V. E. SHWAB,

M. J. SMITH,

W. LITTERER,

JAMES E. CALDWELL,

*Directors of the Cumberland Telephone & Telegraph Company,*

THE OHIO VALLEY TELEPHONE COMPANY,

By W. W. BERRY,

*Vice President of the Ohio Valley*

*Telephone Company, and*

By J. C. SYMMES,

*Secretary of the Ohio Valley Telephone Company, and*

By W. W. BERRY,

[SEAL.]

JAMES E. CALDWELL,

V. E. SHWAB,

W. LITTERER,

*Directors of the Ohio Valley Telephone Company.*

STATE OF TENNESSEE,  
*County of Davidson:*

I, Ed. V. Jones, a Notary Public in and for the County and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation, created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say that the said  
68 James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and,

They did severally further make oath and say, that the owners of 31,103½ shares of the stock of the said consolidating Cumberland Telephone & Telegraph Company did approve of, and consent, to the consolidation aforesaid, of the said Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing, and that said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the Cumberland Telephone & Telegraph Company, then for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 43,116 shares, and no more, and that the said 31,103½ shares held by consenting owners is more than two-thirds thereof; and,

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in the Hopkinsville *New Era*, a newspaper printed and circulating in Christian County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published as aforesaid more than two weeks previous to entering into the said agreement, and executing said Articles of Consolidation; and,

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, James E. Caldwell, and Leland Hume, as President and Secretary

of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and,

The said James E. Caldwell and the said Leland Hume also then, this day, severally acknowledged the within instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company; and,

69

I do further certify that A. G. Sharp, George R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, Wm. Litterer, and James E. Caldwell, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of eleven members, and no more, and that seven members is a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instruments, or Articles, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 27th day of January, 1900.

[SEAL.]

ED. V. JONES,

*Notary Public for Davidson County, Tennessee.*

My commission expires January, 1904.

STATE OF TENNESSEE,

*County of Davidson:*

I, Ed. V. Jones, a Notary Public in and for the County and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named W. W. Berry, Vice President of the Ohio Valley Telephone Company, a corporation created and existing under, and by virtue of, the laws of the State of Kentucky, and the within named J. C. Symmes, Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such Vice President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me, and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say, that the said W. W. Berry was, and is, the Vice President of the Ohio Valley Telephone Company, and that the said J. C. Symmes was, and is, the Secretary thereof; and,

That they know the corporate seal of the said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said, The Ohio Valley Telephone Company, is such seal; and,

That it was so affixed by order of the Board of Directors of the

said Company, and that by like order, they signed the name of said Company to said instrument; and,

70 They did severally further make oath and say, that the owners of 5,447 shares of the stock of said consolidating, the Ohio Valley Telephone Company, did approve of, and consent to, the consolidation aforesaid, of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing; and that said writings, or written consents, are now on file with them, and in their custody and possession, as Vice President and Secretary of the Ohio Valley Telephone Company, for said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Ohio Valley Telephone Company, is 5,494 shares, and no more, and that the said 5,447 shares, held by consenting owners, is more than two-thirds thereof; and,

They did also then further and severally make oath and say, that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein, and that such notice was also published in the *New Era*, a newspaper printed and circulating in Jefferson County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published, as aforesaid, more than two weeks previous to entering into the agreement, and executing said Articles of Consolidation; and,

They did further severally make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, W. W. Berry and J. C. Symmes, as Vice President and Secretary, of the said, the Ohio Valley Telephone Company, were by them delivered to, and filed with, and are in the custody and possession of James E. Caldwell and Leland Hume, as President and Secretary of the consolidated, the Cumberland Telephone & Telegraph Company, for said corporation; and,

The said W. W. Berry, and the said J. C. Symmes, also then, this day, severally acknowledged the within instrument to be the act and deed of the said, the Ohio Valley Telephone Company, and to be their act and deed, as Vice President and Secretary, of the said Company; and,

I do further certify that W. W. Berry, V. E. Shwab, Wm. Litterer, and James E. Caldwell, with each of whom I am personally acquainted, this day did also appear before me, and make oath and say, respectively, that they are Directors of the above named consolidating corporation, the Ohio Valley Telephone Company, that the Board of Directors now consists of five members, and no more, and that four is a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument,

71 or Articles; and they severally acknowledged the said instrument to be the act and deed of the said, the Ohio Valley Telephone Company, and to be their act and deed, as Directors of said Company, for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of

office, at my office in Davidson County, Tennessee, on this, the 27th day of January, 1900.

[SEAL.]

ED. V. JONES,  
*Notary Public for Davidson County, Tennessee.*

My commission expires January, 1904.

STATE OF KENTUCKY,  
*Christian County:*

I, Jno. P. Prowse, Clerk of the Christian County Court, do certify that the foregoing Articles of Consolidation for the Cumberland Telephone & Telegraph Company with the Ohio Valley Telephone Company was this day produced to me in my office with the foregoing certificates of acknowledgments thereon endorsed.

Whereupon the same was lodged and ordered to record, and with this and the foregoing certificates, has been duly recorded in my office.

This, January 29, 1900.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,  
*Christian County, sct:*

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State of Kentucky, hereby certify that the foregoing instrument of writing is a true and perfect copy of Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, as the same appears of record and now on file in my office.

Given under my hand and seal of office as Clerk aforesaid, and sole custodian of the records of the Christian County Court, at my office, in the city of Hopkinsville, this, March 21, A. D. 1900.

[SEAL.]

JNO. P. PROWSE, *Clerk,*  
By W. P. WICKS, *D. C.*

I, C. B. Hill, Secretary of State, certify that the hereto attached Articles of Incorporation were this day filed with me, in my office, by said corporation, and a check for \$3,000, being tax on the increase in capital stock, was this day deposited, payable to the State Treasurer.

Given under my hand, this, 24th day of March, 1900.

C. B. HILL,  
*Secretary of State,*  
By HARRY G. TANDY,  
*Asst Secretary of State.*

72 STATE OF KENTUCKY,  
*Office of Secretary of State:*

I, C. B. Hill, Secretary of State, for the Commonwealth aforesaid, do hereby certify that I have compared the foregoing writing with



the originals on file in this office, purporting to be a true and correct copy, and that the same is correct.

Given under my hand and official seal, this, 7th day of February, 1901, and in the 109th year of the Commonwealth of Kentucky.

[SEAL.]

C. B. HILL,  
*Secretary of State,*  
By HARRY G. TANDY,  
*Ass't Secretary of State.*

*Amended Articles of Incorporation of the Cumberland Telephone  
& Telegraph Company.*

Statement and Amendment.

STATE OF KENTUCKY,  
*Christian County, set:*

Whereas, At a special meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the 8th day of January, A. D. 1903, a Resolution was then voted for, passed and consented to in writing by the owners of 80,126 shares of the capital stock of said Company, and which Resolution was and is as follows, viz.:

*Resolved*, That the authorized capital stock of this Company, which is now One Hundred Thousand (100,000) shares of One Hundred (\$100) Dollars each, aggregating Ten Millions of Dollars (\$10,000,000) be increased to Two Hundred Thousand (200,000) shares of One Hundred (\$100) Dollars each, so as after such increase to aggregate Twenty Millions of Dollars (\$20,000,000) in all; and  
be it further

73 *Resolved*, That the President of this Company and the Directors of this Company, or a majority thereof, be, and they are hereby authorized, empowered and directed to make, sign, execute under the seal of this Company, and acknowledge the necessary and proper Statement and Amendment to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and,

Whereas, Notice in writing was given as, and in manner and form as required by law, by the Secretary of the Company, by written notice mailed to each and every stockholder twenty days before the day and date of said meeting that the proposition in the said Resolution would be then submitted to the said stockholders for their consideration and action; and,

Whereas, At a meeting of the Board of Directors of the Cumberland Telephone & Telegraph Company, duly held on the 9th day of January, A. D. 1903, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, execute under the seal of the Company, and acknowl-

edge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and James E. Caldwell, W. W. Berry, Wm. Litterer, M. J. Smith, F. O. Watts, V. E. Shwab, A. G. Sharp, W. R. Cole, Geo. R. Knox, being nine of the twelve Directors, constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company under which it now exists and operates, and particularly the fourth article of the "Articles of Consolidation" entered into by the Cumberland Telephone & Telegraph Company and The Ohio Valley Telephone Company, which Articles are dated the 27th day of January, A. D. 1900, and were recorded on January 29, 1900, in "Book of Articles of Incorporation," pp. 370-379, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State, of the State of Kentucky, on the 24th day of March, A. D. 1900, have been, and are hereby amended in accordance with the said Resolution, and was so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Twenty Millions of Dollars (\$20,000,000) in the aggregate, divided into Two Hundred Thousand (\$200,000) shares of One Hundred (\$100) Dollars each."

*In Witness Whereof*, We, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this the 9th day of January, A. D. 1903.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

[SEAL.] By JAMES E. CALDWELL, *President*.

Attest:

LELAND HUME, *Secretary*.

W. W. BERRY,  
WM. LITTERER,  
M. J. SMITH,  
F. O. WATTS,  
V. E. SHWAB,  
A. G. SHARP,  
W. R. COLE,  
GEO. R. KNOX,  
JAMES E. CALDWELL,  
*Directors of the Cumberland Telephone & Telegraph Company.*

STATE OF TENNESSEE,

*Davidson County:*

I, J. C. Symmes, a Notary Public in and for the State and County aforesaid duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument; and,

75 They did severally make oath and say that the owners of Eighty Thousand One Hundred and Twenty-six shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is Ninety-three Thousand Five Hundred and Sixty-three (93,563) shares, and no more, and that the said Eighty Thousand One Hundred and Twenty-six shares held by the consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and for the purposes therein expressed and contained; and,

I do certify that James E. Caldwell, W. W. Berry, Wm. Litterer, M. J. Smith, F. O. Watts, V. E. Shwab, A. G. Sharp, W. R. Cole, George R. Knox, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumber-

land Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors, and no more, and that eight members are a majority of a full Board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company and to be their act and deed as Directors of said Company for the purposes therein expressed.

*In Witness Whereof*, I have hereunto set my hand and seal of office, at my office, in Davidson County, Tennessee, on the 9th day of January, A. D. 1903.

[SEAL.]

J. C. SYMMES,

*Notary Public for Davidson County, Tennessee.*

My seal of office expires on 2d day of August, 1903.

75½ STATE OF KENTUCKY,  
*Christian County, set:*

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing Statement and Amendment of the Articles of Incorporation, of the Cumberland Telephone & Telegraph Company, was this day produced to me in my County with the foregoing certificate, thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this, January 15, 1903.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,  
*Office of Secretary of State:*

Cumberland Telephone & Telegraph Company having this day filed in the office of Secretary of State of the State of Kentucky, a certified copy of its amended Articles of Incorporation, increasing the amount of its capital stock from Ten Million Dollars to Twenty Million Dollars, and having paid the State tax of one-tenth of one per cent, upon the amount of said increase, amounting to Ten Thousand Dollars.

This certificate is issued as evidence of the fact that the capital stock of said corporation has been increased from Ten Million Dollars to Twenty Million Dollars in the manner prescribed by law.

*Witness*, My official signature, this, 29th day of January, 1903.

C. B. HILL,  
*Secretary of State.*

COMMONWEALTH OF KENTUCKY,  
*Office of Secretary of State:*

I, C. B. Hill, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

*In Testimony Whereof*, I hereunto sign my name, and cause my official seal to be affixed. Done at Frankfort, this, 30th day of January, 1903.

C. B. HILL,  
*Secretary of State.*

By S. COOK,  
*Ass't Secretary of State.*

76

D.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

*vs.*

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor; GEORGE T.  
O'HAYER, Chief of Police of Memphis.

EXHIBIT B TO THE BILL.

Filed October 2nd, 1907. Dan F. Elliotte, Clerk.

THURSDAY, July 16, 1903.

*Meeting of the Legislative Council of the City of Memphis, Shelby  
County, Tennessee, Thursday, July 16, 1903*

The Legislative Council of the City of Memphis met this day at 8:20 o'clock p. m. *present* to call of the Mayor. Present: J. J. Williams, Mayor; R. B. Henderson, Vice Mayor; E. C. Green, W. D. Moon, David Gensberger, E. B. Le Master, William La Croix, and A. B. Caruthers, Supervisors of Public Works.

The Mayor presided. All of the members of the Council except (Armstead and Grace) were present, and the following proceedings were had:

Committee on Street lighting and Electric Wires and Ordinances and Resolutions submitted the following joint report upon the compromise settlement of the suit between the City of Memphis and the Cumberland Telephone & Telegraph Company, signed by all the members of the said Committee with the exception of Mr. Litty, Chairman of Committee on Ordinances and Resolutions.

77 To the Honorable Legislative Council of the City of Memphis:

GENTLEMEN: We, your Committees on Street lighting, Electric Wires and Gas, and on the Ordinances and Resolutions, desire to report that we met in joint session at the City Hall this evening for the purpose *odf* considering the matter of the settlement of our dispute with the Cumberland Telephone & Telegraph Company and

desire to report that, after full discussion, we have agreed upon the settlement of said dispute upon the basis of a contract by and between the City of Memphis and the Cumberland Telephone & Telegraph Company which we herewith submit and ask its adoption in lieu of all other settlements we have proposed.

Respectfully submitted,

WM. LA CROIX,

W. D. MOON,

E. B. LEMASTER,

*Street Lighting, E. W. & G. Comm.*

A. B. CARUTHERS,

E. B. LEMASTER,

*Ordinance & Resolution Comm.*

The contract referred to in the foregoing report was next read as follows:

Whereas, for the recovery of certain pole rental provided for under the Ordinance of the City of Memphis passed February 25, 1902, a suit was instituted by the City of Memphis against the Cumberland Telephone & Telegraph Company on June 25, 1902 in Chancery Court of Shelby County, Tennessee, which was removed, to and is now pending in the United States Circuit Court.

And, whereas, the said City of Memphis and the said Cumberland Telephone & Telegraph Company desire to compromise and  
78 settle said suit:

It is now stipulated and agreed between the said parties that in consideration for the agreements and undertakings by the said Cumberland Telephone & Telegraph Company hereinafter set out, the said City of Memphis, after the payment of all Court costs by the said Telephone Company, hereby orders said suit to be dismissed. In compromising and dismissing said suit, however said city does not surrender any right that it may have to collect a pole rental from the Telephone Company, except for the years 1902 to 1903. For any year or years after 1903 the right of the City to collect the pole rental from said Company remains unchanged and unprejudiced by this agreement in compromise of the pending suit, and whatever rights, if any, the said Telephone Company may have in the defense of any suit brought for such rental are also unprejudiced by this agreement.

The several undertakings and agreements of the said Cumberland Telephone & Telegraph Company with the City of Memphis, which the considerations for the dismissal of said suit are as follows:

First. The said Telephone & Telegraph Company in the Exercise of any right which it may have, shall not charge for its services as a telephone company, an amount which shall exceed an average per station One (\$1.00) Dollar per week until the number of stations connected with the Exchange of said Company shall exceed Seven Thousand when the limitation upon charges fixed in this contract shall cease.

Second. The said Telephone Company shall furnish free for the use of the Police and Fire alarm wires of the said City one duct

in its present under-ground system, and such additional system as it may construct from time to time, together with the necessary and proper space in the various man-holes for the use of the wires. Said telephone Company shall also furnish free, for the use of the Police and Fire Alarm wires of the City, space upon all of its poles now, or hereafter erected, and shall erect up-rights and cross-arms of such reasonable dimensions and constructions as the City may direct upon the top of its poles, for the placing of the said City wires; but the City's wires shall be so placed as not to interfere with the wires of said Telephone Company.

Third. The said Telephone Company shall erect and establish a ringing circuit, and furnish bells and generators for the same in all of the fire engine houses now used, or hereafter to be acquired and used by the City. Said Telephone company shall also establish and erect a Twelve Drop switchboard for the Police Station of said City, and extension lines for eight desks sets in the Police Station of said city.

Fourth. Said telephone Company shall furnish telephones free of charge to the following City institutions and offices, viz: City Secretary's Office, Mayor's Office, Board of Health Two (2) Creamatories, Engineer's Office, Two (2) City Stables, Hospital, Board of Education, and the same service to public School Buildings as now rendered.

Fifth. The performance of the things hereinabove specified shall be a continuing obligation upon said Telephone Company, its successors and assigns so long as it may exercise any rights that may have to do — a telephone business in the City of Memphis.

In witness whereof, the said City of Memphis and the said Cumberland Telephone & Telegraph Company through their officers have hereunto signed their names and set their seals this the 16th day of July, 1903.

80 Upon motion of Mr. Henderson seconded by Mr. Green the report of the joint Committee was adopted, and the contract approved by the following vote: Messrs. Henderson, Moon, Carruthers, La Croix, Green and Lemaster "Ayed" and Messrs. Litty and Gensberger "Noed."

6 Ayed and 2 noed.

The Contract was then signed by all of the members of the Committee present (except) Mr. Litty.



No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

VS.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor of Memphis, and  
GEO. T. O'HAYER, Chief of Police.

EXHIBIT "C" TO BILL.

Filed Oct. 2, 1907. Dan F. Elliott, Clerk.

An Ordinance

To Regulate Charges of Telephone Companies in City of Memphis.

SECTION 1. Be it ordained by the Legislative Council of the City of Memphis, that all telephone companies operating a system of telephones in the city of Memphis shall charge for each telephone in places used for business purposes, not exceeding five dollars per calendar month; and for each telephone in private residences not exceeding two dollars and fifty cents per calendar month. And every subscriber for either a business or residence telephone shall have the right to pay for the same monthly, in advance, in accordance with the above rates. And such telephone company shall have the right to charge an increased rate of fifty cents per month to all subscribers who remain in default after the 10th of each month. Provided, this ordinance shall not apply to telephone companies whose rates are fixed by contract with the city of Memphis.

SEC. 2. Be it further ordained that any such telephone company that shall charge more for the use of its telephones than the respective amounts above set out shall be guilty of a misdemeanor, punishable by a fine of ten dollars for each offense. And each day that any such telephone is operated by any telephone company at a rate in excess of that set out shall constitute a separate offense under this ordinance.

SEC. 3. Be it further ordained that any telephone company operating a telephone system in the city of Memphis which, after  
82 being tendered the rates above set out in this ordinance shall refuse to operate telephones for those who demand same shall be guilty of a misdemeanor punishable by a fine of ten dollars for each offense. And each day that such telephone company continues its refusal to operate any telephone after such tender and demand shall constitute a separate offense under this ordinance.

SEC. 4. Be it further ordained that this ordinance take effect from and after its passage, the public welfare requiring it.

Passed final reading Tuesday, Sept. 24, 1907.

JAMES H. MALONE, *Mayor*.

Attest:

ENNIS M. DOUGLASS,

*City Register.*

## STATE OF TENNESSEE,

*City of Memphis, County of Shelby:*

I, Ennis M. Douglas, City Register, do hereby certify that the foregoing is a full, true and complete copy of an ordinance passed by the legislative council of the City of Memphis, Tenn., Tuesday, Sept. 24, 1907.

This October 2, 1907.

ENNIS M. DOUGLASS,  
*City Register.*

83

F.

## EXHIBIT "D."

Filed Oct. 2, 1907. DAD F. ELLIOTTE, Clerk.

Cumberland Telephone & Telegraph Co.

*Earnings and Expenses.*

Memphis, Tenn.

	Year 1906.	Average.	Year ending 8 31 07.	Average.
No. of subscribers first of year. ....	7,209		7,356	
No. added during year. ....	2,145		2,070	
No. discontinued during year. ....	1,549		1,773	
Average for year. ....	7,440		7,667	

## Earnings.

Rentals. ....	\$263,310.62	\$35.39	\$280,355.50	\$36.56
Proportion of toll revenue credited to exchange. ....	16,288.45	2.19	17,421.67	2.28
Misc. ....	2,276.70	.30	2,971.66	.39
	281,875.77	37.88	300,748.83	39.23

## Expenses.

General—				
Sal. & Wages. ....	10,096.38	1.36	10,848.40	1.42
Rent, Light & Heat. ....	403.85	.05	469.94	.06
Traveling. ....	1,413.50	.19	1,285.91	.16
Postage, Ptg. & Sta. ....	4,786.05	.64	5,580.85	.72
Directory. ....	3,254.46	.44	3,607.39	.47
Taxes. ....	12,754.06	1.72	13,554.75	1.77
Legal. ....	4,405.00	.59	9,346.48	1.22
Bad Debts. ....	4,397.34	.59	6,635.05	.87
Incidental. ....	2,395.08	.32	2,306.90	.30
	43,905.72	5.90	53,635.67	6.99
Operating—				
Sal. & Wages. ....	60,174.01	8.09	60,917.68	7.95
Rent, Light & Heat. ....	6,064.00	.81	7,362.69	.96
Adv. & Canv. ....	2,392.16	.32	2,860.53	.37
Incidental. ....	1,993.84	.27	10,030.31	1.31
	70,624.01	9.49	81,191.21	10.59

<b>Maintenance, Current Repair—</b>				
Sal. & Wages .....	38,493.01	5.17	47,337.78	6.18
Rent, Light & Heat .....	1,807.08	.24	2,118.70	.27
Material .....	3,480.90	.47	3,092.55	.40
Traveling .....	0,206.30	.84	0,173.00	1.20
Insurance .....	4,002.70	.55	2,528.65	.33
Damage & Comp. ....	1,958.60	.26	3,043.05	.40
Incidental .....	422.52	.06	515.25	.07
	56,491.06	7.50	67,808.98	8.85
<b>Maintenance, Reconstruction—</b>				
Sal. & Wages .....	35,517.60	4.78	40,655.11	5.31
Rent, Light & Heat .....	6.48	....	10.91	....
Material .....	35,307.27	4.76	30,272.50	5.12
Traveling .....	3,890.35	.52	4,872.43	.63
Incidental .....	....	....	1.73	....
Maintenance—Reserve .....	1,309.09	.18	1,470.32	.19
	76,120.88	10.24	83,351.36	10.87
Instrument Rental .....	12,581.95	1.69	13,399.97	1.75
Total Expenses .....	\$259,724.51	\$34.91	\$299,367.10	\$39.05
84 Net Revenue .....	\$22,151.25	\$2.97	\$1,381.64	\$0.18
Cost of plant in Memphis .....	\$1,014,945.13		\$1,111,618.21	
Per cent Net Revenue to Investment ..	2.18%		12%	

Correct:

H. BLAIR SIMMS, Auditor.  
Sep. 28/1907.

85

G.

In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE &amp; TELEGRAPH CO.

VS.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor of the City of  
Memphis, and GEORGE T. O'HAYER, Chief of Police of Memphis.*Cost Bond.*

Filed October 3, 1907. Dan F. Elliott, Clerk.

Know All Men by these Presents, That we, Cumberland Telephone & Telegraph Company and E. E. Wright are held and firmly bound unto said defendants City of Memphis, James H. Malone Mayor and George T. O'Hayer Chief of Police in the sum of Two Hundred and Fifty Dollars; but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said complainant in the Circuit Court of the United States for the Western District of Tennessee, at said Memphis, against the said defendant; and also on failure of the said complainant to prosecute the said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals, this 3rd, day of October, A. D. 1907.

CUMBERLAND TELEPHONE &  
TELEGRAPH COMPANY,  
By E. E. WRIGHT, *Attorney.*  
E. E. WRIGHT, *Surety.*

Approved and acknowledged before me this 3rd day of October A. D. 1907.

DAN F. ELLIOTTE, *Clerk.*

86

H.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.  
vs.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor; GEORGE T. O'HAYER, Chief of Police of Memphis.

*Restraining Bond.*

Filed October 3rd, 1907. Dan F. Elliotte, Clerk.

UNITED STATES OF AMERICA,  
*District of West Tennessee:*

Know all men by these presents, That we, the Cumberland Telephone & Telegraph Company, as principal, and E. E. Wright, as surety, are held and firmly bound unto the City of Memphis, James H. Malone, Mayor, and George T. O'Hayer, Chief of Police of said City, their heirs, executors, administrators, assigns and successors in the penal sum of Ten Thousand (\$10,000.00) Dollars, for the payment of which well and truly to be made and done, we bind ourselves and each of us, our heirs executors, administrators and assigns and successors both jointly and severally by these presents.

Signed and sealed this 3rd day of October, 1907.

But the condition of the above obligation is such; That, whereas, the above bounden Cumberland & Telephone Company has this day filed its bill of complaint in the Circuit Court of the United States for the Western Division of the Western District of Tennessee against said city of Memphis, James H. Malone, Mayor and George T. O'Hayer Chief of Police of said City, and has obtained a restraining order therein.

Now, therefore, if the said Cumberland Telephone & Telegraph Company shall pay all costs damages and losses which may be recovered against it in consequence of the suing out of said restraining order and shall abide by and perform the orders

87

and decrees of the said Court in said cause, then this obligation to be void, otherwise to remain in full force and effect.

CUMBERLAND TELEPHONE &  
TELEGRAPH COMPANY, [SEAL.]

By E. E. WRIGHT, *Attorney*. [SEAL.]  
E. E. WRIGHT, *Surety*. [SEAL.]

Approved and acknowledged before me this 3rd day of October, 1907.

DAN F. ELLIOTTE, *Clerk*.

88 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

v.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor; GEORGE T.  
O'HAYER, Chief of Police.

*Summons.*

Issued Oct. 3rd, 1907. Returned and filed Oct. 5th, 1907. Dan F.  
Elliotte, Clerk.

The President of the United States of America, to the Marshal of the  
Western District of Tennessee:

You are hereby commanded to summons The City of Memphis, a  
municipal corporation, organized and existing under the laws of  
the State of Tennessee; James H. Malone, Mayor of the City of  
Memphis, and George T. O'Haver, Chief of Police of the City of  
Memphis, citizens of the State of Tennessee, if to be found within  
your District, to appear before the Circuit Court of the United States,  
in the Sixth Circuit thereof, for the Western District of Tennessee,  
at Memphis, in said District, on the first Monday in November,  
next, and then and there to plead, answer or demur to the bill filed  
in the office of the Clerk of the said Court on the 2nd day of Octo-  
ber A. D. 1907, against said defendants by The Cumberland Tele-  
phone & Telegraph Company, who is a citizen of the State of  
Kentucky.

89 Herein fail not, and have you then and there this Writ.  
Witness, the Honorable Melville W. Fuller, Chief Justice  
of the Supreme Court of the United States, and the Seal of  
said Circuit Court at Memphis, this 3rd day of October, A. D. 1907,  
and the 132nd year of American Independence.

[L. s.]

DAN F. ELLIOTTE, *Clerk*.

*Memorandum.*

The said defendants, The City of Memphis, James H. Malone and  
George T. O'Haver are required to enter their appearance in this

suit in the office of the Clerk of the Circuit Court at Memphis, Tennessee on or before the day on which the Subpoena is returnable or the allegations of the Bill will be taken for confessed against said defendants and judgments rendered accordingly.

DAN F. ELLIOTTE, *Clerk.*

*Marshal's Return.*

OFFICE OF U. S. MARSHAL, MEMPHIS, TENN.

This summons together with three copies of same and two copies of the Bill filed in this cause came to hand on this the 5th day of October, 1907 and was executed on the City of Memphis and on James H. Malone, Mayor of the City of Memphis, by reading and making contents of this writ known to James H. Malone, Mayor of the City of Memphis, Tenn., and at the same time leaving with him copies of this summons and a copy of the bill in this cause.

And this Writ was further executed on George T. O'Haver, Chief of Police of the City of Memphis by reading to him this writ and leaving with him a copy of this writ and a copy of the Bill in this cause.

Done at Memphis, Tenn. This Oct. 5, 1907.

FRANK S. ELGIN,

*U. S. Marshal,*

By GEO. H. POOLE, *Deputy.*

90 UNITED STATES OF AMERICA,  
*Western Division of the Western  
District of Tennessee:*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court at a regular term thereof begun and held for its May Term A. D. 1907, at the United States Court House in the City of Memphis, in said District, on to-wit the 2nd day of October A. D. 1907, in the following cause, to-wit:

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

CITY OF MEMPHIS, JAMES H. MALONE, Mayor, and GEORGE T. O'HAYER, Chief of Police.

*Restraining Order.*

Whereas, in the above style- cause it has been made to appear upon the sworn Bill of Complaint and exhibits attached thereto that a Writ of Injunction preliminary to a final hearing is proper and that prima facie complainant is entitled thereto enjoining defendants from acts complained of and threatened.

It is therefore upon motion of said complainant ordered that each and every one of defendants appear before the Circuit Court of the United States for the Western Division of the Western District at Memphis, Tennessee on the 9th day of October A. D. 1907, at 10:00

A. M. to show cause, if they have any why the preliminary  
91 injunction prayed for in complainant's bill should not issue.

And it further appearing that there is danger of irreparable wrong and injury being caused and inflicted upon the complainant before the hearing of said application for preliminary injunction unless each and every one of defendants are restrained as hereafter set forth.

Now, Therefore, complainant's application for said restraining order is hereby granted upon its giving good and sufficient bond, to be approved by the Clerk of the Circuit Court, in the sum of Ten Thousand Dollars (\$10,000.00) securing defendants against any and all loss of damages arising out of or resulting from the issuing of this order if it should be finally determined that it was improperly issued.

Now, therefore it is ordered that each and every one of said defendants, to-wit: City of Memphis, James H. Malone, Mayor and George T. O'Haver, Chief of Police of said City their agents, servants attorneys and all persons acting by or under their direction and authority be and are hereby restrained, enjoined and prohibited from attempting to enforce the terms and provision of an ordinance of the City of Memphis, passed September 24th, 1907, entitled "An ordinance to regulate charges of Telephone Companies in the City of Memphis the full provision of which are set forth in complainant's bill and from in any manner interfering with complainant the Cumberland Telephone & Telegraph Company, its officers or agents in charging its subscribers and patrons its present rates or such reasonable rates as it may fix and prescribe for the service rendered its subscribers and users of its said telephone exchange until the further orders of the Court.

92 It is further ordered that a duly and properly certified copy of this order be served on each and every of said defendants and the service thereof shall be sufficient notice to said defendants to appear and show cause on the 9th day of October A. D. 1907 as above ordered.

Issued this 2nd day of October A. D. 1907.

THE UNITED STATES OF AMERICA,

*Sixth Judicial Circuit, Western District of Tennessee:*

I, Dan F. Elliotte, Clerk of the Circuit Court of the United States, for the Western Division of the Western District of Tennessee, do hereby certify that the foregoing paper is a full, true, perfect and correct copy of the original Restraining Order as the same appears of record and upon the files in my office, in the following cause; to-wit:



No. 628. Equity.

THE CUMBERLAND TELEPHONE &amp; TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor; GEORGE T. O'HAYER, Chief of Police of said City.

In testimony whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in City of Memphis, Tennessee, this 3rd day of October, A. D. 1907, and of the Independence of the United States the 132nd year.

[L. s.]

DAN F. ELLIOTTE, Clerk.

93

*Marshal's Return.*

OFFICE OF U. S. MARSHAL, MEMPHIS, TENN.

This Restraining Order came to hand on this the 3rd day of Oct. 1907 and was executed on the City of Memphis and on James H. Malone, Mayor by reading and making contents of same known to James H. Malone Mayor of the City of Memphis, Tenn. and at the same time leaving with him copies of this Order. Done at the City of Memphis, Tenn. at 2 o'clock P. M. this Oct. 3rd, 1907.

FRANK S. ELGIN,

*U. S. Marshal.*By GEO. H. POOLE, *Deputy.*

And this Writ was further executed on George T. O'Hayer, Chief of Police of the City of Memphis, Tenn. by reading and making contents of this Writ known to him and at the same time leaving with him a copy of this writ. Done at the city of Memphis, Tenn. at 3:30 o'clock P. M. this Oct. 3rd, 1907.

FRANK S. ELGIN,

*U. S. Marshal.*

94

UNITED STATES OF AMERICA,

*Western Division of the Western District of Tennessee:*

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term A. D. 1907, at the United States Court House in the City of Memphis, in said District on to-wit, the 9th day of October, A. D. 1907, in the following cause, to-wit:

No. 628. In Equity.

THE CUMBERLAND TELEPHONE &amp; TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAMES H. MALONE, Mayor; GEORGE T. O'HAYER, Chief of Police.

In this cause, upon application of complainant for an injunction herein, the Court is, upon application of the solicitor for the defend-

ants herein, pleased to, and does now continue the hearing of such application, to next Monday, October 14th.

It is therefore ordered that the restraining order issued herein, remain in force and effect, pending the hearing of said application. All other matters are reserved.

95 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS et al.

*Joint and Separate Answer of the City of Memphis, James H. Malone, Mayor, and Geo. T. O'Haver, Chief of Police.*

Filed October 12th, 1907. Dan F. Elliott, Clerk.

These defendants, the City of Memphis, Jas. H. Malone, Mayor, and Geo. T. O'Haver, Chief of Police, now and at all times hereafter saving themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained in answer thereto, of to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering jointly and separately say:

1.

Respondents admit the corporate existence of complainant but are not informed as to the various charters of incorporation mentioned in the bill, nor of the states in which complainant was incorporated. They admit the defendant, the City of Memphis, is a municipal corporation created and existing under the laws of the State of Tennessee, and that James H. Malone is Mayor thereof and George T. O'Haver is the Chief of Police of said City, both the Mayor and Chief of Police being resident citizens of said City.

96

2.

Respondents admit that the business of the complainant is to conduct telephone and telegraph exchanges for the purpose of conveying communications through the medium of lines of wires and exchanges, and that it charges certain tolls or rates for the benefit or use of its service. Respondents admit that complainant also operates what is known as a long distance telephone and telegraph wires and exchanges. They are not accurately informed as to the history of the organization and existence of complainant's telephone system in the City of Memphis as set out in paragraph 5 of the bill, and, insofar as defendant's interests are to be affected thereby, they call for strict proof of the same.

Respondents admit that complainant has erected its poles and wires upon the streets of the City of Memphis, but they deny that complainant has any contract with the City of Memphis by which it is entitled as a matter of right to use the streets of said city, but; on the contrary, respondents aver that complainant occupies said streets and highways of the city of Memphis by sufferance only; and that said City has the right under the law to make and enforce reasonable terms upon which the use of its streets and highways may be had in the future by complainant company.

## 3.

Respondents admit that since complainant company has been operating its exchanges and enjoying the use of the streets and highways of the City of Memphis with its poles and wires, that complainant company has enjoyed great prosperity; that its business has grown to a great volume; that its subscribers have increased to more than seven and one half thousand, and that its income has grown  
97 until it now has a vast annual income. They admit that so great has been the prosperity of the complainant company that it has been enabled to extend its long distance service to a number of adjoining states in this territory.

Respondents further admit as alleged in paragraph 8 of the bill, that on or about the 25th day of February, 1902 the Legislative Council of the City of Memphis passed an ordinance imposing a tax of \$3.00 per annum on each and every pole of the complainant in the streets of the city of Memphis, and that the said city afterwards filed a bill in the Chancery Court of Shelby County, Tennessee, for the purpose of enforcing said ordinance and collecting said tax, and that about the date set out in the bill said suit was compromised between complainant company and the city of Memphis, by which said suit was dismissed at the cost of the Cumberland Telephone and Telegraph Company.

Respondents admit that under the terms of the compromise of the said law suit, the City gave up all claims to pole rentals up to the time of the dismissal of said suit, but it was expressly stipulated in said compromise that no future pole rental which the city might claim under said ordinance should be affected thereby, and that said compromise affected solely the back pole rentals at the time of the settlement of said suit. They admit that in consideration of the City's dismissing said suit complainant company agreed to furnish free telephone service to the city offices set out in the bill, and to the police station. Respondents deny, however, that said compromise of said law suit for pole rentals created any contract whatever between the City of Memphis and complainant company as to future pole rentals, or to the rates which should be charged for telephone  
98 service after the number of subscribers for complainant company's telephones reached seven thousand or over; and respondents deny that there is anything in the compromise and settlement of said law suit which in any manner prevents the city of Memphis from enforcing the ordinance regulating telephone rates, set out in paragraph 14 of the bill.

## 4.

Respondents admit that complainant company is now charging for its telephone service the rates set out in paragraph 9 of the bill, but they deny that said rates are too low, and they deny that they do not yield the complainant company a reasonable return on the actual investment in the Memphis Telephone Exchange; on the contrary respondents aver that said rates now charged by complainant company for its telephone services are entirely too high; that they are an excessive charge for their service to subscribers as may be seen by comparison of complainant's said rates with the rates charged in other cities of the size of Memphis, where telephone systems, or exchanges of equal size are operated. Respondents admit that on or about the 24th day of September, 1907, as alleged in the bill, the legislative council of the City of Memphis passed the ordinance set out in paragraph 14 of complainant's bill, regulating the rates to be charges by telephone companies operating in the City of Memphis, and that under said ordinance *m*the rate per month for each business telephone was fixed at \$5.00 and the rate per month for each resident telephone was fixed at \$2.50; but respondents deny that said ordinance is null and void. They deny that the Legislative Council of said city has not the power or authority to fix or prescribe the rate to be charged by telephone companies in said city, and they

99 deny that the rates fixed by said ordinance are unreasonable and unjust; on the contrary respondents aver that the City of Memphis has complete and full authority to pass said ordinance regulating telephone rates, and they aver that the rates fixed therein are reasonable and just and provide a sufficient and reasonable return upon complainant company's investment in its telephone system in the City of Memphis.

## 5.

Respondents are not informed accurately and are not in a position to know the exact sum invested by complainant company in its Memphis telephone system, nor the amount of the net revenue which complainant company receives annually therefrom; but they aver upon information and belief and according to the printed statement of complainant company issued on the 31st day of August, 1907, that complainant's net return upon its capital invested in the Memphis Telephone exchange was 8.82 per cent, said statement of the capital stock, gross revenue, expenses, etc. is attached hereto, marked Exhibit "A" to respondent's answer and prayed to be taken as a part hereof. Respondents not being in a position to know all the financial affairs of complainant company they call for strict proof of same in so far as respondents' interests are to be affected thereby. Respondents again deny that the rates fixed by said ordinance will prevent complainant company from earning a reasonable return upon its investment in the Memphis Exchange.

Respondents deny that said ordinance is void for the reason that it discriminates between telephone companies; on the contrary respondents aver that said ordinance does not work any discrimina-

tion, but applies to all telephone companies alike. Respondents deny that the provision of said ordinance permitting a subscriber to pay for his telephone monthly is an unreasonable provision, but they aver that it is just and reasonable and works no hardship upon complainant company. Respondents admit that it was the purpose of the city of Memphis, James H. Malone and George T. O'Haver to enforce said ordinance, until the restraining order was issued by this court; they aver also that they have a right to enforce said ordinance, that same is entirely valid and reasonable and right. They deny that complainant company has any just cause or reason for restraining the enforcement of said ordinance and deny that the complainant company is necessarily subjected to any controversy, law suit, or differences on account of said ordinance. Respondents deny that the enforcement of said ordinance would work irreparable injury or any injury whatever to complainant company, but merely prevents said company from charging more than reasonable rates for the use of its services. They deny that complainant is entitled to any injunction from this honorable court restraining them from enforcing this said ordinance.

All other allegations of the bill not either herein expressly admitted or denied are now denied as fully and completely as if specifically mentioned. Wherefore these defendants having fully answered, confessed, traversed and avoided or denied all the matters of said bill of complainant material to be answered, according to their best knowledge and belief, humbly prays this honorable court to decree that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained; that the injunction prayed for be denied and complainant's bill dismissed; and for such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

MARION G. EVANS,

JAMES L. McREE,

*Solicitors for Defendants.*

101 STATE OF TENNESSEE,  
*Shelby County:*

I, James H. Malone, one of the defendants in this cause, do solemnly swear that the facts set out in the foregoing answer of defendant- are true.

JAMES H. MALONE.

Subscribed and sworn to before me this 12th day of Oct., 1907.

THOS. J. DIXON,

*Notary Public.*

## 102 EXHIBIT "A" TO ANSWER OF RESPONDENTS.

Filed October 31st, 1907. Dan F. Elliott, Clerk.

Cumberland Telephone & Telegraph Company, Incorporated, Nashville, Tennessee.

Operates in the States of Illinois, Indiana, Kentucky, Tennessee, Louisiana, Mississippi.

Connections to All Points.

*August Statement, 1907.*

103 An intimate knowledge of the methods of our business, which it is our earnest desire that every financial interest possess, would unfailingly demonstrate that its securities could be recommended to customers without qualification as the safest of investments.

So earnest are we in our wish, that any interested persons need take nothing for granted, but may know for themselves just what the conditions are; that we would esteem it a privilege to be allowed to go into the subject at greater length, and place at your disposal the records, which speak for themselves.

*Toll Lines and Connections.*

Connections at Shreveport and Lake Charles, Louisiana, for all Texas points.

Connections at Memphis, Tennessee, for Arkansas points.

Connections at Chattanooga, Tennessee, for Georgia, North and South Carolina and Florida.

Connections at Louisville, Kentucky, and Evansville, Indiana, for all points North, East and West.

104 *Exchanges in Operation.*

January 1, 1894.....	15
" 1895.....	21
" 1896.....	32
" 1897.....	41
" 1898.....	53
" 1899.....	88
" 1900.....	137
" 1901.....	231
" 1902.....	282
" 1903.....	339
" 1904.....	358
" 1905.....	394
" 1906.....	498
" 1907.....	509
Sept. 1, 1907.....	526

*Subscribers.*

January 1, 1894.....	4,476
" 1895.....	4,686
" 1896.....	6,303
" 1897.....	7,910
" 1898.....	10,635
" 1899.....	19,651
" 1900.....	30,755
" 1901.....	57,080
" 1902.....	78,915
" 1903.....	92,425
" 1904.....	103,744
" 1905.....	121,313
" 1906.....	141,266
" 1907.....	165,190
Sept. 1, 1907.....	169,749

The Subscribers' Stations are equipped with highest type instruments.

105 & 106 *Operations for the Month of August, 1907.*

Earnings from Exchange Service.....	\$336,464	58
Earnings from Toll Service.....	129,292	75
Miscellaneous Revenue .....	20,507	65
Total Gross Revenue.....	\$486,264	98
Expenses: General (including Taxes).....	\$56,261	92
Operating .....	103,679	82
Maintenance.....	146,761	01
Instruments .....	20,063	53
Miscellaneous (including Interest) .....	18,231	49
Total Gross Expense.....	\$344,997	77
Balance Revenue.....	\$141,267	21
Increase of Gross Revenue over corresponding month last year.....	50,965	99
Increase of Gross Expense over corresponding month last year.....	27,526	55
Increase in Net Revenue over corresponding month last year.....	23,439	44
Per cent of Gross Telephone Expense to Gross Telephone Revenue.....	69.50	
Per cent of Net Revenue to Capital Stock.....	8.82	



*Capital and Revenue.*

Year.	Capital stock.	Gross revenue.	Net revenue.	Dividend.
1894....	\$1,695,700 00	298,259 95	\$137,211 61	4 per cent
1895....	1,695,700 00	325,295 08	154,536 29	4 "
1896....	1,695,700 00	411,634 23	202,859 77	4 "
1897....	1,695,700 00	489,616 97	220,849 46	4 "
1898....	2,875,000 00	816,966 78	326,937 96	5 "
1899....	3,459,200 00	1,144,893 30	439,681 88	6 "
1900....	6,017,700 00	1,884,013 78	517,061 07	7 "
1901....	7,261,200 00	2,642,562 87	638,062 68	7 "
1902....	9,106,200 00	3,070,162 27	782,164 70	7 "
1903....	11,367,250 00	3,480,042 55	1,040,092 18	7 "
1904....	11,695,350 00	4,027,117 21	1,374,167 46	7 "
1905....	13,449,650 00	4,656,422 71	1,509,284 22	7 "
1906....	16,812,050 00	5,384,844 76	1,647,436 52	7 "
8 months 1907....	19,223,550 00	3,848,070 80	1,145,770 82	

The stock of the Company is listed on the Boston and New Orleans, La., Stock Exchanges, and is handled by the Brokers in New York, Boston, New Orleans, Nashville, Louisville and Memphis.

*Financial Statement, August 31, 1907.**Assets.*

Cost of Exchange and Toll Lines.....	\$23,695,232 35
Supplies on hand .....	423,007 90
Real Estate (Exchange Buildings).....	786,286 48
Stocks and Bonds.....	181,376 14
Cash.....	617,991 73
<b>Total .....</b>	<b>\$25,703,894 60</b>

*Liabilities.*

Capital Stock.....	\$19,223,550 00
Bonded Debt.....	781,000 00
Debentures.....	239,000 00
Subscription to Capital Stock .....	1,725 00
Balance Bills and Accounts Payable and Receivable.	1,415,290 20
Employés' Savings Accounts.....	65,406 61
Surplus, Reserve and Undivided Profits.....	3,977,922 79
<b>Total.....</b>	<b>\$25,703,894 60</b>

*Board of Directors.*

John W. Barr, Jr., Louisville, Ky., President Fidelity Trust Co.  
 E. M. Barton, Chicago, Ill., President Western Electric Co.  
 W. W. Berry, Nashville, Tenn., President American National Bank.  
 W. S. Bransford, Nashville, Tenn., Retired Merchant.  
 James E. Caldwell, Nashville, Tenn.

W. R. Cole, Nashville, Tenn., President Napier Iron Works.  
Frederick P. Fish, Boston, Mass., President American Bell Telephone Co.  
William Litterer, Nashville, Tenn., Retired Merchant.  
W. K. Phillips, Nashville, Tenn., Wholesale Groceries.  
James S. Robinson, Memphis, Tenn., Druggist.  
Col. A. J. Sharp, Atlanta, Ga., American Bell Telephone Co.  
V. E. Shwab, Nashville, Tenn., Geo. A. Dickel & Co., Wholesale Liquors.  
M. J. Smith, Nashville, Tenn., Wholesale Groceries.  
F. O. Watts, Nashville, Tenn., President First National Bank.  
W. H. Woolverton, New York, N. Y., Vice-President Gamewell Fire Alarm Co.

*Officers.*

James E. Caldwell, President.  
Leland Hume, General Manager.  
T. D. Webb, Treasurer.  
Jno. W. Hunter, Jr., Secretary.  
H. Blair Smith, Auditor.  
W. L. Granbery, General Counsel.

110

M.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

CITY OF MEMPHIS.

*Opinion of Court.*

Filed October 31st, 1907. Dan F. Elliotte, Clerk.

In this case the pressure of other business does not permit that the questions here involved should be discussed regularly in any opinion upon the subject, and I am compelled, on account of the demands of other business, simply to announce the conclusions at which I arrive, and this will be quite sufficient, as the able solicitors on both sides will understand entirely well, in view of their discussion of the case, the bearing of these conclusions.

In the first place, I conclude that the City of Memphis is without any legal authority to regulate rates in the method attempted to be done by this ordinance. It is very true that the able solicitors for the City refer to very sweeping and general language in the delegation of authority to the Legislative Council of the City, the precise language referred to being as follows:

"Be it further enacted that the Legislative Council shall have power to pass, for the government of the City, any ordinance not in conflict with the constitution or laws of the United States or the State of Tennessee."

This must be construed as having reference only to the ordinary powers and authority exercised by municipal corporations, and such as are ordinarily conferred on them. This language, general as it is, could not be properly construed as authorizing the City to enter upon such an unusual and exceptional subject as that of rate  
111 regulation by a municipal corporation. Such a power does not arise by implication, but must be expressly conferred, or must be positively necessary to the exercise of a municipal power which is itself expressly delegated. That is not the case here, and I really think that it is very clear that the City is without authority to adopt and enforce the legislation found in the ordinance called in question in this case.

This is all that it is positively necessary or material to decide at this time, but I think that the complainant is entitled to an injunction, even if the right of regulation were conceded, because:

1. I think the city is estopped and bound by the contract set out in the bill as prohibiting it from adopting the legislation now called in question.

2. The bill distinctly charges that the rates fixed by this ordinance are such that if enforced they would not permit a reasonable income on the capital invested and that the result would be confiscatory and destructive.

Under such circumstances, on an application for injunction it has been customary to protect the situation by allowing a preliminary injunction pending an investigation of the facts as to whether the rates are reasonable or unreasonable. If the injunction were denied and this ordinance put into effect and destructive or confiscatory rates actually enforced and a full investigation of the facts should result in showing that the rates were confiscatory and destructive, the court would then be powerless to do anything in the way of reparation or compensation for the injury sustained in the meantime.

Upon the execution of bond in the sum of five thousand dollars, conditioned as required by law, the preliminary injunction will be allowed. If the situation is such as to call for it, in the  
112 opinion — the City's able solicitors, this bond could be increased at any time on application for that purpose and a proper showing of good ground for doing so.

Proper orders can be prepared for approval giving effect to the views herein expressed.

CLARK, *Judge*.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. Equity.

CUMBERLAND TELEPHONE & TELEGRAPH CO.

v.

THE CITY OF MEMPHIS, TENNESSEE, et al.

*Affidavit of H. Blair Smith.*

Filed Oct. 31st, 1907. Dan F. Elliotte, Clerk.

Affiant makes oath in due form of law and states: That he is now and has been for many years the auditor of the complainant company.

That the exhibit attached to the bill in this case, showing the receipts and disbursements of the Memphis Exchange for the year 1906, and for the year ending August 31, 1907, was compiled by him from the original records of the company; that the same are true and correct as affiant verily believes, and correctly show the transactions of the complainant company with reference to the Memphis exchange during the periods above mentioned; and that the expenses have been properly classified in accordance with the rules of the complainant company, and the best conducted telephone companies in America.

Affiant further states that the portion of toll revenue credited to the Memphis exchange is the amount allowed by this company to other companies operating exchanges and handling this company's toll business, and that it is the amount reasonable and proper to be allowed to a local exchange for handling long distance business, but that in the capital account no part of the long-distance equipment and lines are included but only the actual cost of the telephone exchange at Memphis.

114 Affiant hereto attach-s a statement showing the various rates charged its various patrons to the Memphis exchange, and the number of patrons taking each particular class of service, and the amount paid by each; and, the same is correct and taken from the original records of the company.

Affiant also attach-s a statement showing the reduction in revenue which would be sustained by the complainant company if it should be required to operate that exchange at the rates provided in the ordinance complained of in the bill, and affiant further states that from experience, as well as from well known facts relating to the telephone business that the cost of operating an exchange increases as the number of subscribers increases, and that if a reduction in subscribers' rates would result in an increase in subscribers, the loss to the company would be greater as the subscribers increased.

Affiant states that this is a well known fact and so recognized by telephone engineers.

Affiant further states that the rates established by the complainant company at the Memphis exchange are the rates charged in the event they are not paid in advance, but where they are paid quarterly in advance a discount of fifty cents per month is deducted and in this way a rate of \$7.50 per month gross in the statement attached hereto means \$7.00 net per month, if paid quarterly in advance.

It is not true that the complainant company has increased its business from time to time with money derived from its patrons, but the same has been done by the issuance of capital stock from time to time, as follows, all of which has been issued at one hundred cents in the dollar, and paid for one hundred cents in the dollar:

115	Capital outstanding January 1, 1898.....	\$1,695,700
	May 6, 1898.....	1,179,300
	April 3, 1899.....	584,200
	September 30, 1899.....	864,550
	May 25, 1901.....	1,467,400
	December 16, 1901.....	1,871,200
	March 2, 1900.....	1,693,950
	December 23, 1902.....	2,339,050
	February 1, 1905.....	1,754,300
	February 1, 1906.....	3,362,400
	February 1, 1907.....	3,362,400
		<hr/>
		\$20,174,450

H. BLAIR SMITH.

Sworn to and subscribed before me this the 14th day of October, 1907.

J. C. SYMMES,  
Notary Public.

[N. P. SEAL]

116 *Estimate of Loss in Revenue, Exchange Service at Memphis, Tennessee.*

In case Rates are Reduced on

Business contracts from \$7.00 net to \$5.00 net.  
Residence " " 3.00 " " 2.50 "

Subs.	Business.	Rate.	Reduction per month.	Loss.
30		\$8.50 Gross.		
19		7.75 "	\$2.00	
1		7.67 "		
880		7.50 "		
		<hr/>		
930				\$1,860.00

# CHARTS

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TOO

LARGE

FOR

FILMING

7	\$6.00 net.	\$1.00	7.00
1	6.67 gross.	1.00	1.00
33	6.50 "	1.00	33.00

---

 \$1,901.00

Subs.	Residence.	Rate.	
483		\$3.50 Gross.	.50
19		3.25 "	.25

---

 \$241.50

---

 4.75

Loss from Business..... 246.25  
 \$1,901.00

---

 \$2,147.25

Loss per annum ..... \$25,767.00

This statement does not consider rates charged for trunk lines for Private Branch Exchanges, these being special contract. Party line rates not considered.

Correct:

H. BLAIR SMITH, *Auditor.*

Oct. 11, 1907.

(Here follow fac-simile statements marked pages 117, 118, 119, and 120.)



121 In the Circuit Court of the United States, for the Western  
Division of the Western District of Tennessee.

#628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS et al.

*Bond on Preliminary Injunction.*

Filed November 7th, 1907. Dan F. Elliotte, Clerk.

The Cumberland Telephone & Telegraph Company, The complainant in the above entitled case, as Principal, and E. E. Wright, as Surety, acknowledge themselves to owe and be indebted to the defendants The City of Memphis, James H. Malone, Mayor, and George T. O'Haver, Chief of Police, in the penal sum of Five Thousand Dollars (\$5,000.00), for the payment of which well and truly to be made, they bind themselves, their heirs successors, administrators and assigns.

Witness their hands this the 7th day of November, 1907.

But the condition of the above obligation, is as follows, to-wit:

The Cumberland Telephone & Telegraph Company has obtained a preliminary injunction in said cause upon its giving bond in the penal sum of Five Thousand Dollars, conditioned as required by law.

Now therefore, if it should hereafter be determined that said preliminary injunction was wrongfully obtained, and the said Complainant shall pay, or cause to be paid the said defendants and each of them, and the subscribers to complainant's telephone exchange and each of them, all damages which may accrue to them and

each of them growing out of the wrongful issuance of this  
122 injunction, then this injunction shall be void; otherwise, it shall remain in full force and effect.

Witness our hands the day and date above written.

THE CUMBERLAND TELEPHONE &  
TELEGRAPH COMPANY.

By E. E. WRIGHT, *Attorney.*

E. E. WRIGHT, *Surety.*

123 UNITED STATES OF AMERICA,  
*Western Division of the Western  
District of Tennessee:*

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in Said Court at a Regular Term Thereof, Begun and Held for its May Term A. D. 1907, at the United States Court House in the City of Memphis, in Said District, on to-wit the 9th Day of November A. D. 1907, in the Following Cause, to-wit:

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY  
vs.  
THE CITY OF MEMPHIS et al.

Whereas, in the above entitled cause a bill for the issuance of a preliminary injunction was duly filed and set down for hearing before the Honorable C. D. Clark, a Judge of said Court on October 14th, 1907, notice of such application having been given to said defendants, and each of them, and the Parties appearing by their solicitors and being heard upon such application, and it appearing that cause exists for the granting of a writ of injunction, pending the final hearing of this cause as prayed for,

It is, therefore, Ordered, that upon Complainant giving bond in the penal sum of \$5,000.00, with a good and sufficient surety, conditioned that the complainant will pay the defendants and subscribers all damages which may accrue to them, and 123½ each of them, growing out of the wrongful issuance of this injunction, a writ of injunction issue commanding and restraining and enjoining these defendants, their attorneys, agents and servants, that they, and each of them, desist and refrain from attempting to enforce the terms and provisions of the Ordinance enacted by the legislative Council of the City of Memphis on September 24th, 1907, regulating and fixing maximum rates which complainant was permitted to charge its subscribers to its telephone exchange in the City of Memphis, Tennessee, and prescribing penalties for any charges in excess of said rates—said Ordinance being fully set out in the Bill of complaint herein; or from in any manner interfering with complainant or its agents in charging its subscribers its present rates, as set forth in the bill of complaint herein. Until the further orders of the Court in the premises.

124 In the Circuit Court of the United States, for the Western Division of the Western District of Tennessee.

No. 628. Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

VS.

THE CITY OF MEMPHIS, JAMES H. MALONE, et al.

*Commission to Take Depositions.*

Issued to H. M. Doak, Clerk Circuit Court of U. S., Nashville, Tennessee.

Issued December 24th, 1907. Dan F. Elliotte, Clerk.

This day comes the complainant the Cumberland Telephone & Telegraph Company by Wright & Wright their solicitors and moves for an order appointing a qualified person at Nashville in the State of Tennessee, authorizing and empowering him, as a special examiner of this Court, to take and transmit to this Court testimony of James E. Caldwell and H. B. Smith, residents of said City, witnesses on behalf of the complainant to be used on the trial of this cause; and it appearing that said commissioner should be appointed:

It is ordered that H. M. Doak, Clerk of Circuit Court of U. S. for the Middle District of Tennessee at Nashville, Tennessee be, and he is hereby, appointed a Special Examiner of this Court, and that he be and he is hereby authorized and empowered to take and transmit to this Court the testimony of the above named witnesses in answer to oral questions to be put to said witnesses by the respective parties at the time of taking such testimony.

Witness, Dan F. Elliotte, Clerk and the seal of said Court, at office in Memphis, this 24th day of December A. D. 1907.

[L. s.]

DAN F. ELLIOTTE, Clerk.

125 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY  
vs.

CITY OF MEMPHIS et al.

*Depositions of James E. Caldwell and H. Blair Smith.*

Filed February 25th, 1908. Dan F. Elliotte, Clerk.

The Depositions of James E. Caldwell and H. Blair Smith, Taken  
by Consent, in Nashville, Tennessee, on this Monday, February  
3rd, 1908, at nine o'clock A. M., to be Read as Evidence on Behalf  
of the Cumberland Telephone & Telegraph Company in the  
Above-styled Cause.

Caption, certificate and all formalities are expressly waived, and  
the right to except for relevancy and incompetency are alone re-  
served.

It is agreed that the said depositions, when transcribed, signed and  
sworn to by the witnesses, may be transmitted to the Clerks of the  
Respective courts at Memphis, Tenn. and shall be filed by them  
without the observance of any formalities.

It is further agreed that the said depositions being taken in both  
cases at one time, for the purpose of saving time and expense, that  
the Counsel for the City of Memphis may except to the examination  
in chief, and have stricken out matter brought out on cross-  
126 examination, upon the ground that it is irrelevant and in-  
competent, in the particular case in which the depositions are  
filed.

Present: Mr. William L. Granbery, and Mr. Luke E. Wright,  
Solicitors for the Cumberland Telephone & Telegraph Company;

Mr. J. L. McRee, and Mr. M. G. Evans, Solicitors for the City of  
Memphis, and

Buford Duke, Stenographer and Notary Public.

Said witness, JAMES E. CALDWELL, being first duly sworn, deposed  
as follows:

Direct examination.

By Mr. GRANBERY:

Q. State your name, age, residence and occupation?

A. My name is James E. Caldwell; age, fifty-three years; reside at  
Nashville, Tennessee, and am President of the Cumberland Tele-  
phone & Telegraph Company.

Q. Please state your connection with the Cumberland Telephone  
and Telegraph Company when you first became connected with it,  
and the various positions you have held since?

A. I was originally a director and member of the Executive Committee, from about 1885 off and on down to 1890, at which  
127 time I became president and general manager. I have held the position of President continuously from that time down to the present date, and held the position of general manager also, until *ago* two years ago.

Q. Have you since 1885 been familiar and conversant with the affairs of the defendant company?

A. I have.

Q. Did you, at any time prior to 1885 have any knowledge of the company's business in the City of Memphis?

A. Well, I had information of it only since I became connected with it in 1885, and knew nothing about it, of my own knowledge, prior to that time.

Q. Do you know how the property of the company was acquired in Memphis?

A. It was acquired by purchase or consolidation; I think it was counted a purchase.

Q. I will ask you to state whether or not the original minute book of the company, under date of June 30th, 1883, being minutes of a meeting of the Executive Committee of this Company, contains this language:

"Resolved, that in consideration of the conveyance, transfer and assignment to this company, by bill of sale executed by the Memphis Telephone and Electric Company, of Memphis, Tenn., of their entire property, assets and franchises of every description as it stood on the 21st day of June 1883, this company shall pay to the stockholders of the said Memphis Telephone and Electric Co. pro  
128 rata, according to their respective stock, the sum of \$220,000 in cash, or in the paid up capital stock of this company."

A. It does.

Q. Have you in your possession the original minute book of the company?

A. I have.

Q. And does the language quoted, appear therein?

A. It does. The book is now in my possession and is now before me.

Q. Has it been in the possession of the company since your first connection with it?

A. It has been, continuously, ever since I have had anything to do with its affairs, and I am entirely familiar with the book and have had occasion to refer to it often during past years.

Q. State whether or not the action of the executive committee was approved by the Board of Directors at a meeting held July 26th, 1883, and state whether or not this approval appears in the original minute book of the company under that date?

A. The Board of Directors, at their meeting on July 26th, 1883, ratified and approved the action of the executive committee of June 30th, 1883, in purchasing the Memphis property, and the same appears upon the minutes in said minute book, which I now have before me.

Q. State whether or not the contract or purchase was ratified and

approved at the stock holders meeting held August 15th, 1883, as appears from the minutes of the meeting of the stockholders held that day?

129 A. I have the minute book of the Company, and find that at the meeting of the stockholders held August 15th, 1883, they took the following action:

"Whereas, the said Board of Directors have purchased the property, assets and franchises of the Memphis Telephone and Electric Co. of Memphis, Tenn., for the sum of \$220,000, to be paid in cash or in the paid up capital stock of this company to the stockholders of said company, pro rata, according to the amount of stock by them respectively held therein.

"Therefore, be it resolved, that the said several contracts and purchases be and they are hereby approved, ratified and confirmed and the Board of Directors of this company are authorized to pay for the property so purchased according to the terms of said contracts, and to issue to the persons thereto entitled, such amounts of the capital stock of this company, as paid up stock, as may be required for that purpose.

Q. Have you the books and records and papers of the Memphis Telephone and Electric Company.

A. No sir, I have not.

Q. Have you had search made and failed to find them?

A. Yes sir.

Q. Do you recollect ever seeing them?

A. No sir, I don't recollect ever to have seen them?

Q. Has the Cumberland Telephone and Telegraph company from before 1885, until the present time, operated the exchange in the city of Memphis?

130 A. They have, without cessation.

Q. Do your records show that this contract of purchase from the Memphis Telephone and Electric Co. was carried out and the consideration paid?

A. They do. The stock referred to in the minutes was regularly issued and is outstanding now as a liability of the company.

Q. From 1885 to the present time, state whether or not you have been familiar with the operations of the Cumberland Telephone and Telegraph Company in the City of Memphis?

A. I have been entirely familiar with them.

Q. State whether or not the city officials, from 1885 continuously until with the recent past, recognized the right of the Cumberland Telephone and Telegraph Company to occupy the streets of Memphis with its poles and wires in operating a telephone exchange in Memphis?

A. They did.

Q. Did you in person ever have any dealings with the city authorities with reference to setting poles?

A. On many occasions.

Q. Have you in your possession any permits, or permissions from the city authorities with reference to setting poles?

A. There are a great number of such permits in the company's possession.

Q. It is agreed between counsel, that these various permits, instead of being filed, are now handed to counsel for the City of Memphis, and stipulation will be made between counsel later on, covering their contents, which stipulation may be filed as an exhibit to and as a part of this deposition.

131 Q. Mr. Caldwell, state if you remember or if you have any information which you know to be correct, as to the number of subscribers, the exchange at Memphis had in January, or January 1st, 1885?

A. 802.

Q. How many did it have January 1st, 1884?

A. 582.

Q. How many did it have January 1st 1890?

A. 1454.

Q. January 1st, 1900?

A. 2430.

Q. And January 1st, 1908?

A. 7,786.

Q. What were the maximum business and residence rates in January or January 1st, 1884?

A. There were two rates only; all business rates were \$55.00 a year, and all residence rates were \$45. a year, payable annually in advance. This was for what was known as a grounded line service, Blake transmitter type of service.

Q. What were the maximum rates January 1st, 1908? and for what class of service?

A. In 1908 the maximum business rates was \$7. per month, payable quarterly in advance, and the maximum residence rate was three dollars a month, payable quarterly in advance. These were for metal-ic or double wire, long distance type of instruments.

Q. Please state the average annual charge, per subscriber, for telephone service in the Memphis exchange on January 1st, 1884?

A. \$54.16.

132 Q. What was the average rate for the year 1890?

A. \$56.80.

Q. What was it for the year 1900?

A. \$51.54.

Q. What was it for the year 1907?

A. \$37.26.

Q. You have been speaking of the average rate per annum; what does that mean?

A. It is arrived at by taking the total gross receipts of the exchange and dividing it by the total number of subscribers to the exchange and necessarily, therefore, includes all of the maximum and minimum rates paid, thereby showing the average rate that is paid by the community.

Q. You spoke of the maximum business rate being \$7.00; were there other business rates also for different classes of service?

A. There were a number of business rates lower than that, for various classes of service, which were offered to and used by the public, and the same is likewise true as to residences.



Q. It appears from the evidence in this case, that in the beginning, when the exchange was first established at Memphis, and for some time thereafter, there was no distinction made between the rate paid by a business house and a residence. Has that practice been discontinued?

A. Yes sir, that was discontinued at the time, or just before, I had any connection with the telephone business.

Q. Is there any difference between the use of the service and the cost to the company of giving the service, between a business house and a residence?

133 A. There is a difference in the average amount of use that is made of the system, between a business establishment and a residence. The business houses use the service oftener than do residences.

Q. Is it or not a fact, that the increased use means an increased cost to give the service?

A. Yes sir, After all, that is the initial item of cost in the service.

Q. State whether or not from the time you first became connected with the company, continuously to the present time, the investment of the company in Memphis plant has increased or diminished?

A. It has steadily increased, without an exception, every year, during that time.

Q. Is this necessary?

A. It is absolutely necessary, for the reason that every subscriber that is added to the exchange, requires individual, special and additional capital invested for his interests.

Q. Is this peculiar to the telephone business?

A. It seems to be so.

Q. Please point out the difference or distinction between a telephone investment and other public service companies, with respect to the capital account?

A. Just as stated, every customer has to have special facilities provided for his private and particular use; whereas, in every other form of public service they use, to a large extent a common property. Street cars, for instance, take on additional passengers without having to provide special cars for each additional passenger, and this applies to all forms of transportation. Telegraph Companies use the same lines and poles and clerks in transmitting the  
134 messages of individuals, as they come, and so it seems to run well nigh through the list. This is peculiarly true with regard to this company by reason of the fact that it furnishes or supplies every item of property which goes to give individual service. That is to say, they supply all interior as well as exterior wiring and apparatus, whereas, with gas, electric light and water companies, they require the customer to furnish that part of the property which is used and necessary for their exclusive and private premises, and to make their own connections.

Q. Is the furnishing of this interior wiring and apparatus for each customer a material expense upon the company?

A. It is a very large and a very important item.

Q. Can any part of this interior wiring be reclaimed after the subscriber ceases to be a customer?

A. All of the interior wiring is practically a total loss whenever a subscriber discontinues his patronage. I should say both interior wiring and ground connection.

Q. What do you mean by ground connection?

A. In each telephone there is a ground connection that has to be made. It is the wire that runs from the telephone and connects with an iron rod which is inserted for some depth in the ground, in order to make a safe and sure ground connection.

Q. Does it necessitate any expense upon the company when a patron discontinues his service?

A. It not only necessitates the loss of this interior and ground connections, but it also requires time and expense of men  
135 to go and remove the instrument from the premises, so that is an actual cash outlay in addition to the loss of material, in the case of a discontinuance of each and every customer.

Q. Please state the actual cost, in money, of the company's plant in Memphis, as of November 30th, 1907?

A. At the close of November 30th, 1907, the cost of the plant of the Memphis exchange was \$1,125,968.76.

Q. Please state whether or not that plant at that time could have been duplicated, if built new, for that amount of money?

A. It certainly could not have been duplicated for any less, and I doubt if it could have been duplicated for so small an amount.

Q. Now, has that capital account gradually increased from \$220,000 in the summer of 1883 to more than a million and a quarter dollars in the fall or winter of 1907?

A. It has, continually, year by year, ever since that day.

Q. Has it been necessary to make this addition to the capital account from year to year in order to provide telephone facilities for the patrons in Memphis?

A. It has; there was no way by which it could be avoided.

Q. Now, during all these years that the company has been increasing this capital account in Memphis, from a little over \$200,000 to over a million dollars, state whether or not it has been done in the reliance and belief and assumption that it had a right to erect its plant under the permission of the City authorities and use it permanently?

A. The officers and directors of this company never had a shadow of doubt of the perfect legality and permanency and unquestioned  
136 right to do business under its franchises in the City of Memphis.

And, it was entirely by reason of this belief that this continued investment was made.

Q. State whether or not the various city officials, from the beginning of your connection with this company, down to the present time, or the present administration, have dealt with you and the company upon the assumption and in recognition of the fact that the company had the right to operate a telephone exchange in the city of Memphis?

A. They have done so without an exception.

Q. Has the company at any time since your connection with it made a net profit of exceeding six per cent upon the actual cost of its property in any one year, in the City of Memphis?

A. I doubt very much if it has. It certainly has not done so for many years. It is highly probable that when the average rate was shown to be something over \$50.00 that then the net profit was in excess of six per cent.

Q. What was the net profit, year by year, from 1902 to 1907 inclusive?

A. The net profits in 1902 were, \$25,131.46, which was at the rate of 6.13%; in 1903, \$13,205.27, or at the rate of 2.73%, in 1904, \$18,029, or at the rate of 3.14%; in 1905 \$30,357.18, or at the rate of 4.54%; in 1906, \$22,151.06 or 2.97%. Up to November 30th, 1907, \$18,183.88 or at the rate of 2.56%.

Q. Now, do those figures include a proper proportionate amount of the long distance toll receipts of the Memphis office?

A. They do. They contain its regular proportion of the earnings from long distance lines; also, from miscellaneous sources, and includes all of the rentals of the exchange.

137 Q. Will you please explain, if you can, the reason or causes for the fluctuation in the net profits of the plant during those years?

A. Well, they grow more out of the fluctuation in the expenses, but very largely and overshadowingly does it come from the taxes and maintenances.

Q. When you first became connected with the company in 1885, state whether or not the city of Memphis was using the company's poles for its fire alarm system?

A. It was.

Q. Has it, continuously since that time, used the poles for that purpose?

A. It has, without a single intermission.

Q. Has it at any time used the Company's poles for its police patrol wires?

A. Yes, it has used them for that purpose also.

Q. When you first became connected with the company, state whether or not the number of poles and the area over which they extended in the City of Memphis were great or small?

A. It was limited very considerably to the congested part of the city.

Q. Now, as the exchange grew from year to year, state whether or not the poles and wires of the company spread beyond the city limits the suburbs surrounding the city?

A. They did. The growth was met in every direction in and around Memphis, as it presented itself.

Q. Did the company, after you became connected with it, construct toll lines radiating from Memphis?

A. It did in every direction except across the Mississippi River.

Q. Explain just what you mean by toll lines?

A. They are the lines which connect the Memphis exchange with exchanges in other towns and cities and other counties in other states.

Q. Did the company have any poles on the public roads outside of the corporate limits of the city, at the time the corporate limits were extended in 1899?

A. It had a very large number of routes on county roads. Well nigh all the county roads outside of the city, in the suburbs, were covered in this manner?

Q. And the growth of the exchange since has been met since by the setting of side lines to reach subscribers from those main routes?

A. That is the way it has been done.

Q. Did the city, after the corporate limits were extended, use the additional poles of the company that were brought within its corporate limits, for its fire alarm and police patrol systems?

A. They did, and are doing so now.

Q. Did the city at any time require the company to construct what is known as an underground system, in any part of the city?

A. Yes sir. It required all the wires, cables and structures to be placed under ground within the central part of the city. This was done five or six years ago.

Q. Does the company furnish free of cost to the city one duct in this underground area for the city's police and fire alarm wires?

A. It does.

Q. Mr. Caldwell, state from what source the material was obtained, and also the labor with which the city's police and fire alarm system was constructed and has been maintained?

139 A. I think I would be entirely within the truth to say that the entire, or almost the entire, amount was furnished, year by year and from time to time, continuously, by the Cumberland Telephone & Telegraph Company. It has been a steady and regular practice.

Q. Was that under any contract?

A. It was a pure matter of neighborly courtesy and friendly consideration.

Q. Under what agreement, if any, did the City originally erect on the poles of the company, its police patrol wires and service?

A. It was in the same manner that the furnishing of this other service was done, as a neighborly courtesy to them, a friendly affair.

Q. I hand you a contract entered into between the Company and the City of Memphis, under date of July 16th, 1903, and ask you to state whether or not the company entered into that agreement with the city. I hand you the paper, which purports to be the original or a duplicate of the original?

A. This is the original contract entered into on the 16th day of July 1903, between the Cumberland Telephone and Telegraph Company, signed by myself officially, and the city authorities if the City of Memphis, its mayor and board of public works.

Q. Will you attach that contract as Exhibit No. 1 to this your deposition?

A. I will.

By agreement of counsel, a copy may be hereto attached, in lieu of the original, the same being marked exhibit No. 1 to this deposition.

140 Q. What induced the company, or you as its president, to assent to that contract?

A. There was a controversy on between the company and the City of Memphis about some poll rental matters, and the contract was entered into purely to promote good feeling and harmony and peace between the company and the City of Memphis.

Q. Does a hostile attitude of city officials have any effect upon the Company's business in these various exchanges in the cities in which it operates?

A. It has a very hurtful influence upon it, creates disaffection among the customers and creates disaffection among the employes, increasing the difficulties and actual expenses of conducting the business.

Q. Has the company, in addition to the use of its poles and its underground system for the city wires, given to the city of Memphis any Telephone service from time to time for the city's use?

A. It has given a very large amount of service. For Instance, I notice in this very contract one condition was that the city schools would pay the price that they had been theretofore paying for their service, which was furnished free.

Q. Mr. Caldwell, you have stated that the company has furnished the city free telephone service from time to time. How much service was furnished during the year 1891?

A. In 1891 it was \$580.50.

Q. How much in 1901?

A. \$2,079.51.

Q. What was it for 1907?

A. \$4,916.05.

141 Q. How much free service has the company furnished to the City of Memphis in the way of free telephone service from 1891 to 1907 inclusive?

A. \$33,222.57.

Q. Is all this in addition to the police and fire alarm wires on the company's poles, and in the company's underground system?

A. It is, and in addition to the material and labor furnished in the maintenance of same.

Q. Is it also in addition to all taxes, both advalorem and privilege, that have been assessed against the company from time to time?

A. It is. This amount would represent the telephone service, pure and simple.

Q. And upon what basis?

A. Upon the price paid by the public for the same identical class of service.

Q. State whether or not from the time you first became connected with the company in 1885, on down to the present time, the city has each and every year collected taxes from your company on its property and its plant, in the City of Memphis?

A. It has.

Q. State whether or not the company has, to your knowledge or under your instructions or by your authority, set a single pole in the corporate limits of the City of Memphis from 1885 without permission of the proper city officials.

A. There has not been a single pole set without it being expected or required of the representatives of the company to secure the permission of the city officials.

142 Q. Has that been your instruction to your various employees having charge of your company's property in Memphis?

A. Those instructions were given to everyone having charge of such matters.

Q. State whether or not you have made any effort to ascertain whether or not those instructions have been carried out?

A. I have, from time to time, made efforts to find out if they were, with due diligence being carried out, and it appeared to be so.

Q. State whether or not the various local managers from time to time in charge of the exchange at Memphis, had instructions to send to your office or to the general office of the company at Nashville, permits or copies of permits for setting poles?

A. Yes sir, there were a good many of those sent to the Nashville office, and I assume that most of them were. Whether all of them were or not, I do not know, but, at any rate, they were expected and required to get written permits from the city authorities.

Q. State whether or not the company has had any friction or difficulty in obtaining permits for setting poles in the last year or two, in the City of Memphis?

A. Yes, it has had some friction and some difficulty.

Q. Did it at any time prior to the last two years, have any difficulty in getting such permits?

A. I think at times there was some question raised and there would be some delay, but it did not continue very long.

Q. Prior to two years ago, did any of the friction or difficulties or delays in getting permits to set poles, grow out of any dispute or any controversy as to the company's right to set poles in Memphis?

143 A. None whatever.

Q. What caused the delay and friction?

A. As to the advisability or propriety of setting them in the particular locations that we desired to set them.

Q. Now, during the last two years, has the company at any time been denied the right to set poles?

A. I think it has. I think there has been some notion that it did not have the right to do it; that question was raised.

Q. State whether or not the refusal of the city authorities at times during the past two years to permit the company to set poles, resulted in the company being unable to furnish telephone facilities to various parties desiring service in the City of Memphis?

A. I- did.

Q. State whether or not the company has been sued by certain of those parties, because it did not give them telephone service?

A. It has.

Q. Did the company make application to the city officials for permission to set these poles?

A. It did.

Q. And that permission was refused, you say?

A. It was refused and therefore rendered it impossible for the company to comply with the wishes of these respective applicants.

Q. During the recent months, in the last two or three months, state whether or not the city officials have receded from their former position and allowed the company to set the poles necessary to reach their patrons?

A. I understand they have, and are now allowing it to be done.

Q. State whether or not the city officials have, from time to time, required the company to change the location of various poles in the city?

144 A. They have, in very many instances.

Q. State whether or not they have required the company, from time to time and at various places in the city, to put its wires upon the same poles with other wire using companies.

A. Yes, they have required this in certain instances, to accommodate the city's purposes.

Q. Mr. Caldwell, state whether or not the police and fire alarm systems or wires of the city of Memphis are more burdensome upon the poles of the company now than formerly?

A. They are more burdensome, as they are more extensive themselves.

Q. Please explain how the system grew up and whether or not it has extended a burden to the poles, and the wires multiplied on the company's poles.

A. They have, just as the city has been growing, the fire and police service has extended also, and it has multiplied in its scope and use of our structures.

Q. Would the city be able, with safety, to use the electric light poles or the street railway poles for its police and fire alarm wires.

A. It would be a very dangerous thing to do.

A. Why?

A. Should their wires come in contact with the strong currents of the electric light or street railway, it would destroy their service and system.

Q. Would the City of Memphis be able to construct its Police and fire alarm service in the City of Memphis without using any of the Cumberland Telephone & Telegraph Company's property, for as small an amount as a quarter of a million dollars?

A. I don't think it could.

145 Q. Please give your reasons for this belief?

A. It would require the setting of innumerable poles, the trimming of trees and the adjustment of a large pole plan as well as an underground plan.

Q. What about the maintenance of that pole system?

A. The maintenance of those poles would be just as expensive as the maintenance of ours, and it would be a very large annual expense.



Q. What is the average life of a pole in the City of Memphis.

A. Well, it is somewhere between ten and fifteen years.

Q. Can you give any estimate of the cost to this company of maintaining the police and fire alarm of the city upon the company's poles and upon the company's conduits?

A. The cost to this company?

Q. Yes?

A. We have had no figures on it and no special study, but stating it as an off-hand belief, it must be anywhere from twenty-five hundred to five thousand dollars a year.

Q. What part of your time have you given to the study and development of the telephone business from the time you became president of this company in 1890 down to the present time?

A. I have devoted my entire time and talents to it.

Q. Is there anyone else in America who has been in the telephone business, continuously, as long a time as you have been?

A. None that have been continuously much longer. There has been no man that occupied the chief executive position of any company continuously as long as I have. In other words, there is no chief executive officer of any telephone company in America now living that has occupied it, continuously, as long as I have.

Q. What territory does the present company occupy with its various exchanges and toll lines?

146 A. It occupies the territory, including the southern parts of Indiana and Illinois, the States of Kentucky, Tennessee, Mississippi and Louisiana, having exchanges in wellnigh all the cities, towns and villages in that entire territory. The aggregate number of exchanges is about 525, and the number of subscribers are about 175,000, and the toll lines aggregate very close to a hundred thousand miles. This territory is about one thousand miles in one direction, with an average of about four hundred miles wide.

Q. The capital stock of the company, when you became president, was how much?

A. \$1,695,700.

Q. When was it first increased?

A. In May, May 6th, 1898.

Q. Since that time has it been increased from year to year?

A. It has.

Q. What is the present outstanding capital stock of the Company?

A. \$20,174,450.

Q. During your incumbency as president, the stock has been increased from practically a million and a half dollars, to more than twenty-millions?

A. Yes sir.

Q. I will ask you to state each and every one of those increases of stock if they represent a like amount of money put into the treasury of the company?

A. Yes, it was for actual cash or for property that we considered to be worth more than one hundred cents in the dollar, and the case

I refer to was the purchase of the Louisiana property, including the City of New Orleans and the southern part of Mississippi, which we took over at fifty cents on the dollar of their valuation. In other words, we issued Cumberland Telephone and Telegraph Company stock at fifty cents in the dollar of the cost value of that property. Or, in other words, a property that stood them nearly two million dollars was bought by this company by the issuance of a little less than a million dollars; and all the other issues have been for actual money at one hundred cents in the dollar.

Q. I will ask you to state whether or not the patent rights and various franchises now represent anything of value upon the books of this company?

A. They are not carried in the assets as having any value at all. In other words, no value is put upon its franchises or patent rights and carried as an asset in its accounts.

Q. State whether or not at any time the company reduced dividends in order to create a surplus to take care of whatever amount the patent rights had cost the company in the beginning?

A. It did. It began that in about 1891, reduced the dividend from six to four per cent, and held it at four per cent until all the franchises and patent values had been entirely eliminated and charged off.

Q. What patent franchises do you refer to?

A. The original patent franchises of the Bell Telephone Company which were necessary to enable anyone, at that time, to enter the telephone business.

Q. Since the Bell patents expired in 1900 or prior thereto, has this Company paid royalties to any person or corporation?

A. No sir, it has paid no royalties on any patents since then.

Q. Does it buy its material and apparatus in the open markets of the world?

148 A. It does. It rents the telephone instruments themselves and prefers to rent them to buying them, but it can buy them if it wants to, as there is nothing in the way and no contracts to prevent it from doing so.

Q. In other words, the company has found it more economical to rent the instruments, than if they bought and maintained the instruments itself?

A. Yes sir.

Q. But, it can do either?

A. It can do either at any time it wishes?

Q. Please state whether it is practical to operate a telephone property without increasing from time to time its capital account?

A. It is impossible to meet the growth of a telephone business in any other way, practically. As I said before in this deposition, each and every customer that is added to an exchange, requires specific property for his use, thus calling for increased capital. This growth must be met, for it is to the interest of every subscriber that new subscribers be added in order that he may have access to them. Therefore, if the company is going to meet its public obligations, it

has to meet its growth, and if it meets this growth, it is compelled to do so by increasing its capital account, and it is impossible to meet it by an issue of bonds, because one issue of bonds would cloud and make impossible subsequent issues. But, as all stock is of the same character and stands on an equal footing, that issued in one year does not have any priority or preference over that which is issued subsequently. Hence, this has been the only way found to practically finance a telephone property. Every time any  
149 other plan has been attempted, it has proven a failure

Q. Is this the method by which the defendant company has been financed?

A. With the exception of an issue of bonds at one time, when it was impossible for it to sell its stock, and it was only resorted to on that one occasion.

Q. State the amount of that issue?

A. In round figures, it is a million dollars.

Q. Were they sold at par or less?

A. They were sold at par, and a slight premium some of them making the entire issue bring the company par.

Q. What is necessary for the company to do in order to sell additional stock from year to year as the growth and development of the company requires?

A. It must be able to show a sufficient net earning and to actually pay a dividend thereon that would prove sufficiently satisfactory to investors to warrant them in putting their money in such a business.

Q. Then, do you mean to say the public are interested in keeping the stock of the company at a return that will justify you investors, from time to time, putting new money into and coming into the business?

A. They undoubtedly have an interest in it, whether they acknowledge it or not, for it is a fact that the public has an interest in the growth of the business, and that being so, it can not be done, practically, in any other way, and hence it resolves itself into that analysis, that they are interested in seeing the capital stock of the company kept at an attractive figure so that new investors will have an incentive and be inclined to furnish the capital to meet  
150 the further growth of the company.

Q. What dividend does the company at present pay upon its stock.

A. At the rate of seven per cent per annum.

Q. How long has that continued?

A. It has been at that figure now for about eight years.

Q. From the organization of the company in 1883, to January 1st, 1898, what was the average annual dividend paid to stockholders?

A. 5.30%.

Q. Now, from January 1st, 1898, to January 1st 1907, what was the average annual dividend paid?

A. The average during that period was 6.56%.

Q. And I understand you to say the company is now on a seven per cent dividend basis?

A. Yes sir.

Q. Please state whether or not a telephone property is considered in financial circles of the world, a stable or unstable property?

A. It is regarded as a hazardous property.

Q. For what reasons?

A. The character of material, and the character of structure that is employed for its use is of a very perishable nature; the business is such that the very art and the development of the art is not sufficiently advanced to make it free from very expensive evolutions. That is to say, there is a constant improvement going on with regard to the engineering methods and the apparatus employed. This, at times, has been so revolutionary as to call for very large expenditures of money, and is likely to continue. There is the throwing aside of present apparatus, not on account of being worn out, but

151 on account of being superseded by new devices that are calculated to give better results to the public. In other words, when an exchange like Memphis shall grow in size and in average daily use by its citizens to a certain point, everything that is there may have to be re-shaped, part of it discarded which would necessitate and call for a very radical treatment of such an exchange. That may take place at any time, for it is a business that is attracting the attention of the brightest minds all over the world, to develop its wonderful possibilities, for when you consider the variety of use the public can make of it and the wonderful economies it can serve in human affairs, it presents, as I say, a very attractive field for bright and intelligent minds, and what they will bring out of it is impossible for forecast, and it is in the midst of all these possibilities that causes capital to be very timid and cautious in embarking in it. In other words, it is an extremely intricate business, it is intricate in every detail and department. Its scheme of charges is as novel and as unique as could be, different from any other kind of business. As to whether those who are undertaking, and who are clothed with the responsibility of administering its affairs will be able to minimize these difficulties and requirements, are all matters of grave doubt and put every prudent investor on guard.

Q. Is there anything in the suggestion that the property can not be dismantled, and the property be converted back into money as a bank, for illustration?

A. It would be absolutely impossible, utterly absurd, I might say, to talk about dismantling and liquidating the property. It has got to pay as it stands, or it is practically a total loss.

152 Q. You mean, if it does not pay a return upon the investment, that the original investment is lost?

A. Well nigh the whole of the original investment would be lost, for the wreckage value of the property, to transform or convert it to anything else, would be of a very small and insignificant percentage of its value or original cost.

Q. So, a man embarking his capital into a telephone enterprise is

limited forever afterwards to whatever return he can get upon that investment, as a going concern?

A. He is confined wholly to that situation.

Q. State whether or not these conditions have any effect or appreciable effect upon the ability of the management of this property to interest new capital from time to time?

A. They do have a very great bearing on it, and as the business has grown to a point where its growth, or to meet its growth and requirements now calls for such very large sums of money that it brings the subject and the question in contact with and to the attention of the most enlightened and at the same time the most cautious of investors who are not carried away or influenced by the prospective speculation, but must be satisfied as to the permanency and safety of an investment and this is, as I say difficult to do, by reason of the fact that it is such an entirely technical and unexplored business.

Q. I wish you would state the various increases of capital stock, the dates and amount, beginning with the capital outstanding on January 1st, 1898?

153	Capital outstanding January 1, 1898.....	\$1,695,700
	May 6, 1898.....	1,179,200
	April 3, 1899.....	584,200
	September 30, 1899.....	864,550
	May 25, 1901.....	1,467,400
	December 16, 1901.....	1,871,200
	March 2, 1902.....	1,693,950
	December 23, 1902.....	2,339,050
	February 1, 1905.....	1,754,300
	February 1, 1906.....	3,362,400
	February 1, 1907.....	3,362,400
	Total .....	20,174,450

Q. I observe from that answer that the company issued February 1st, 1906, \$3,362,400. For what purpose was this issue of stock put out

A. That issue was made for an increase and extension of the properties.

Q. I observe on January 1st, 1907, you issued another \$3,362,400.

A. That issue of February 1st, 1907 was to retire a floating indebtedness that had become menacing and dangerous, and to provide funds to meet still further increase and growth.

Q. How much capital did the company expend during 1906 in the development and extension of the company's plants and properties.

A. My recollection is it was to the rise of four millions of dollars.

Q. About how many stockholders has the company?

A. About eighteen hundred.

154 Q. Now in issuing this new stock from time to time, how is it put upon the market?

A. It is offered pro rata, at par, to the various then existing stockholders.

Q. And whatever amount they do not take, how is the remainder disposed of?

A. Sold to the public.

Q. In the early days of the company, when the capitalization was small, were the same difficulties met with in putting out new issues of stock that are now encountered?

A. No sir, it went easier.

Q. The financial ability of the management was sufficient to take care of the issues at that time?

A. And to meet personally people; or, in other words, exert their personal influence on individuals in sufficient numbers to take care of issues that required no more money than that.

Q. At present, what is the situation in that respect?

A. As I stated formerly in this deposition, the amount— are so large, we have to depend upon the open markets of the world to find the money, and therefore the business has to tell its own story. Its record and its experience and business, as I say, have to tell the story, as individually can not possibly do so by personal contact and word of mouth with others in sufficient number to raise such an amount of money.

Q. Does the company contemplate a new issue of stock for this year?

A. No sir it does not contemplate it, for it would be impossible for it to do so.

Q. Why?

155 A. Its present stockholders would not take it and it would be impossible to find others outside that would take it, for the reason that the business is not regarded as sufficiently satisfactory and attractive. The returns being made on such property and stock is not now considered sufficient return on the money to be invested and kept in such a business, and it is for these reasons that there will be no effort this year to put out an issue of stock. The situation has been sufficiently canvassed to show the management very conclusively that it can not be done. It will be necessary for the company to show a better state of earnings or better returns on its capitalization before it will be able to make further issues of stock or raise additional amounts of money.

Q. Has this condition caused any uneasiness or alarm to the management or stockholders of the company?

A. It has created an uneasiness and an anxiety both to the stockholders and to the management.

Q. Are there any difficulties ahead of the management in getting the money necessary to make the extensions the present year.

A. There are difficulties in the way.

Q. Is it necessary to have money to make these extensions?

A. It will be absolutely necessary to borrow money in the open markets to meet these requirements, for the company has not the money in hand and it can not sell stocks or bonds to do it with, but

will have to rely upon its credit with banks on short time paper, for borrowing purposes.

Q. And when that paper matures, what will be necessary?

A. There will have to be some form of funding. That will have to be brought about either in stock or bonds, one or the other, 156 to take care of it. Of course if such a debt has to be taken care of in a bond firm, then the difficulties following that would be very great indeed.

Q. In other words, the future with reference to this business, is uncertain?

A. In other words, the company has a financial problem on its hands which the whole management and the board of directors will wrestle with.

Q. Going to another subject, this question of telephone rates, I observe that the average rate in the City of Memphis, through a long period of time had steadily decreased. Is that true with reference to the exchange of this company throughout the territory through which it operates?

A. Yes, pretty much true throughout its territory.

Q. How did that come about?

A. There were two forces. The main force that was working on it was that it was very plain to us all in interest that the permanency of the business was of prime consideration. For it to be permanent, it should be based upon a larger number of people. That is to say, it should serve the communities and the public at large as universally as it was possible. In order for it to do this and get its business in contact with a wider distributed clientel, it felt its way onwards on rates down and down: with the hope and expectancy of increasing its field of usefulness. In its efforts in this direction, it undoubtedly went too far, it approached too close to, if it did not indeed cross the danger line so that it was admonished by its returns, that it would have to retrace and better its average rates through- 157 out its territory. In some places it was undoubtedly deficient and the returns altogether unsatisfactory and Memphis was one of those places.

Q. Please explain in an intelligent way, the growth of the business, taking Memphis as an illustration, I mean, the character of the service given, the extent of the service compared with the rates charged, etc.?

A. Carrying out the policy just before indicated, various forms and various classes of service were offered. What were known as party lines, two four, six, and at one time, ten parties using the same circuit. That is to say, there would be, two, four, six or ten instruments in as many different houses or offices, on the same circuit, the rates for which graded according to the number that were employed on one circuit. There were also measured service rates, that is, parties paying so much for each message; extension sets, rates for joint users, private branch exchange arrangements, that is to say, special equipment for fitting up various department- of business establishments, so that the respective officers or employes could talk from their desk out over the entire system without leaving their seats; instru-



ments in each room in hotels, so that guests could communicate with all the world without leaving their private apartments.

Q. Have the apparatus and appliances for giving telephone service changed materially from time to time, since the exchange first started in Memphis and has there been a corresponding increase in the character of service of quality of service furnished?

158 A. The style of the apparatus has been revolutionized; there is scarcely anything of the same real type and character as was then, and as the facilities became used more and more as a part of the daily life of the city the users became more exacting in their requirements of the service, so that the quality of the service that is now given is undoubtedly and of necessity, of a very much higher order than it has eighteen or twenty years ago. At that time the business people had passed most of their lives using other forms of business communication, which they adhered to and did not rely upon the telephone as their only means, or nearly their only means of communication. But, since that time a new generation of people has come into active affairs of life and their whole training has been to use the telephone and so dependent are they upon it that they use it infinitely more, and hence are far more exacting than were the people of eighteen or twenty years ago. At that time, that is to say in 1890 as I stated before in this deposition, there was used ground wires, that is, one wire, with the earth or ground as a common return, and a very plain form of instrument which required very much less battery than the present instrument. Whereas, the type that is now used is known as a metallic circuit, that is, two wires are used where one was used before, and a great deal of this is of copper wire, instead of iron, by reason of its better conductivity. A type of instrument is used that is very much more efficient in its working, but requires double, or considerably more force, and is in every way an improvement more efficient and vastly more expensive. This applies also to the switchboards and interior equipment.

159 Q. As the commercial currents of electricity, street railways, electric lights and power circuits have increased from year to year in the various cities, has it entailed any expense upon the telephone companies?

A. A very great expense in the care, and necessarily they have to protect their property against these deadly enemies.

Q. The telephone uses no high current of electricity, I believe?

A. No sir, its current is of a very feeble nature, less than the telegraph, except in so far as we use our wires for telegraph purposes, for for telephone purposes, the current is much less than that used by telegraph companies.

Q. Is there any appreciable difference in the expense of giving a moderately reliable telephone service and an entirely reliable telephone service?

A. There is a very great difference. In other words, where you key the whole organization up to the point that is required to give and efficient and high-class service, the expenses of every nature increase and accumulate.

Q. Are the business men of Memphis interested alone in the local service of Memphis or do their needs and demands extend

throughout the entire territory to every little exchange that the company has?

A. It is fair to say that the requirements of the Memphis exchange and the influence of the Memphis exchange covers an area of a hundred miles in each direction; In other words, a circle described by a diameter of two hundred miles, and that entire area

160 has been developed with a view to the advantage and effect and value it would have upon the commerce of the City of Memphis. In other words, the effort has been made to provide a facility that would enable the commerce of Memphis to be handled more economically, more expeditiously and more certainly than it ever was before, and this has actually been done by this company.

Q. Is it a fact that the telephone service between any two points is as good or as bad as the weakest point in the line?

A. Literally so.

Q. Then, the business men of Memphis, in talking to a business man in a small town or village, is the type of apparatus and construction in these small places of the same standard that the construction is in the larger centers?

A. It is necessary to observe the same care right straight through, in order that the large and most important users may have his messages sent through to small places with equal ease and facility and certainty.

Q. Is it true that the business men in Memphis want to talk from their telephones in their office to the business man in the small town in his office?

A. They do.

Q. Therefore, is it necessary that the apparatus from the business man's office clear to the business man's office in the small town shall be of uniform type and standard equipment?

A. It is necessary for it to be homogenous, and of the same type.

Q. Please state whether or not there is any appreciable difference in the value of the service rendered to each patron in Memphis in 1907, as compared with the service rendered to each patron in 1887?

161 A. There is hardly any comparison that can be made. In 1887 they could communicate with less than eleven hundred subscribers, whereas, in 1907, they can communicate with very nearly eight thousand. Therefore it is fair to say that it is fully eight times as valuable. And let me state in that connection, the value is more than is represented by these figures. In 1887 the telephone habit was not on the entire community. The community used it only about in the proportion as there shown, whereas in subsequent years it looked like every baby learned to talk over the telephone, they grew up with the telephone habit fixed, until today, the entire community of Memphis has the telephone habit fixed upon it and while all of them do not pay and become subscribers to the service, yet the practice is to allow any and everybody that rings the telephone to get the service; the subscribers make no objection and the company raises no objection, and hence it is a fact that the entire one hundred and fifty thousand people in Memphis use

daily that service, and the business people therefore reason and say, they will send orders to that entire community, so that a fair and actual comparison of the use and value of the telephone to a subscriber in 1887 bears no relation whatever to the use and value that is made of it now.

Q. The toll line development at that time, was it limited or extensive?

A. I am entirely within the limits to say that there was not more than perhaps a hundred miles of toll line development around Memphis, and that of a very cheap, experimental unreliable nature, of the grounded wire type and a weak form of transmitter, which made it wholly a hit and a miss proposition. In other words, it was a mere novelty. Today it is all built on the most substantial and expensive basis with a complete saturation and

162 represents thousands of miles of poll routes and wires, thus bringing into business contact with and making the telephone of commercial value accordingly—bringing as I say, within reach of the business men and merchants of Memphis the entire trade district of that state, or that city, which must comprise two millions of people. This, as I say, is the trade district immediately surrounding Memphis. In addition to this, they are in speaking contact with the entire community east of Omaha and Kansas City, within which area is embraced the great overwhelming commercial percentage of the United States. That is to say, that the merchants of Memphis, with the telephone of this company on his desk, is in position to be reached by the greater percentage of the people of the United States, and in turn, able to reach them, on the shortest notice and in the most effective manner, and to send and receive, without a hitch, any message or business affairs which he may have occasion to transact.

Q. Is this made possible by contracts with adjoining companies throughout that territory?

A. This is made possible by the arrangements and connections which we have with other companies throughout the country, in addition to these facilities of our own make and in the immediate trade area of Memphis.

Q. How many conversations per day, each twenty-four hours, are given to the people of Memphis over the local exchange? which are free, that is, embraced with the monthly amount paid by each subscriber?

163 A. The average number of messages per day runs something like fifteen or sixteen a day for each telephone that is connected with the exchange.

Q. So that would run it to something like ninety thousand conversations or calls a day?

A. From ninety to a hundred thousand. I think about one hundred thousand a day.

Q. What proportion of those conversations are held during the day hours?

A. The great overshadowing percentage are held during the business hours of the day.

Q. Does that require any expertness in operating and in the best type of apparatus?

A. It requires both, the most expert operators and the best type of apparatus the art has developed.

Q. Is there any analogy between the advertising rates of newspapers and the prices that telephone companies should properly charge for local exchange service?

A. There is a very marked similarity between them. Newspapers increase their rates for their space in proportion to their circulation, and the telephone company should and must follow very much the same line of calculations. That is to say, as its subscribers increase in number and hence the use made of it correspondingly increases the cost and the value of the service.

Q. Has this company been able to do that in Memphis?

A. It has only to a very limited extent and on a small scale on a small class of service, for as stated, its average rate has been tending lower instead of advancing.

164 Q. Does the cost of operating and maintaining the exchange increase or diminish with the subscribers?

A. It increases with the increase in subscribers?

Q. Does it increase in an arithmetical proportion?

A. It is rather in a geometrical progressive ratio.

Q. Has the company exercised prudence in constructing and maintaining the property and in the management and expenses in operating the Memphis exchange?

A. It has endeavored to do so to the very best of its ability. This is eminently true, when it is considered that the officers of this company have at all times been substantial stockholders, and therefore have had every incentive to see that its expenditures were of the most economical and permanent type.

Q. Returning a moment to the number of conversations held each day. Is there any particular time during the day or the night in which the bulk of the conversations are held?

A. It rises higher between ten, or highest between ten in the morning to three in the afternoon. It rises gradually from the early morning up to ten o'clock, and finds its greatest load, as I say, between ten in the morning and three in the afternoon, and then recedes from that time.

Q. I will ask you how you ascertain the number of these conversations?

A. Actual counts are made from time to time, periodically to show exactly the number of messages handled by each operator at each hour during the twenty-four.

Q. Is that true with Memphis alone, or the entire system?

A. It is true with all exchanges.

Q. I will ask you to file the last such count at the Memphis exchange, showing the number of operators, number of calls handled by each during the various hours, and the total number of calls during each hour of the twenty-four?

A. I will do so, as Exhibit No. 2.

165 Q. What per cent. of the entire gross receipts of the Memphis exchange for 1906, was paid to labor?

A. About fifty per cent.

Q. What per cent of the gross receipts was consumed in taxes?

A. About five per cent.

Q. Please turn to the original minute book of the company under date of May 10th, 1888, at the annual meeting of the stockholders of the company, and quote what is there said with respect to the City of Memphis exchange?

A. I find the following, in the minutes of the stockholders' annual meeting on May 10th, 1888, as a part of the proceedings of that meeting:

"During the year it became necessary for the exchange at Memphis, Tenn., to be supplied with new switchboards; the boards there had been used for about seven years; they were of an old pattern and were inadequate to meet the needs of an exchange as large as Memphis had become. We were also required to vacate the building occupied by the Company and locate the exchange some distance away. As a consequence, the routes of the poles and wires had to be altered. It can be easily understood that this required considerable material, as well as labor. The City authorities of Memphis had some time prior thereto refused their assent to the running of new wires, and insisted upon the use of cables. In making the change we therefore had to use 3750 feet of 100 wire, No. 22, B. & S. G. areal cable" etc.

166 Q. State whether or not that minute correctly represents the facts?

A. It does.

Q. Did you have personal knowledge of those things?

A. I was personally connected with it and was familiar with that.

Q. What was meant by not allowing the use of wires and insisting upon the use of cables?

A. That is, not to allow any more open wires to be hung on the poles, but to consolidate them, that is, copper wires in lead covered cables.

Q. The Company some two years ago opened another exchange in the City of Memphis, which is known as Hemlock; what brought about the necessity for this?

A. The main exchange was overly congested and inadequate to handle the business and this was built as an auxiliary to take over the overflow or increased business, yet, both of these offices and exchanges are so interconnected as to give the patrons in one, immediately, connection with the patrons in the other.

Q. The service between these two exchanges is free to every patron in the city?

A. Yes, entirely free.

Q. Please state whether or not any intelligent comparison can be made of rates at different places or in different cities?

A. It can only be taken into account as one of many items of study. Assuming that it was the same management, making the rates and pursuing the same policies at different localities the local

conditions would all be so different as to make the study in one place useful only to a limited extent to others. There of course might be instances and circumstances where the conditions were so nearly alike as to make practically no difference, but when it is at-  
167 tempted to compare them with various places scattered throughout the country, the conditions and practices are all so different that it is impossible to make an intelligent comparison thereof.

Q. What brought about the necessity for the use of cables instead of open wire connection in the City of Memphis?

A. The growth of the business necessitated such a large increase in wires that they became objectionable and made interferences with the City's affairs and that made the change from open wires to cables necessary.

Q. Were there any demands on the part of the city to make these changes?

A. Yes, this was by reason of the city's demand, as it was objecting to so many wires.

Q. Was this cable work more expensive than the open wire work?

A. Yes sir, a great deal more so. In other words, it was a very heavy expense to change these wires to cables, for, in doing so, a large amount of the wires already up and in existence had to be taken down and removed and made to conform with the altered engineering plans.

Q. Were the wires taken down of any value?

A. Of no value to speak of, when taken down. In other words, the labor of taking it down was quite as much expense as the value of the wire, after it was taken down.

Q. Did the company do much of this cable work, substituting cables for open wire work, in the central part of Memphis?

A. It did a very extensive amount of such work, removing nearly all the open wires in the central part of the city and substituting expensive cables therefor.

168 Q. After this took place and the company was operating its plant on cables on its poles in the central part of the city, what happened?

A. The city required the poles and cables to be removed and the system be placed under ground in under-ground subways and this was done at a very enormous cost.

Q. Of what value to the company would this underground structure be, if it could not connect up its wires in these under-ground structures with its poles in the remaining parts of the City?

A. It would be absolutely valueless.

Q. Did the underground system decrease the cost of maintenance?

A. It did not.

Q. Did it increase the revenues of the company in any way?

A. No sir, not a particle.

Q. So, it brought additional expense, without increasing the revenues?

A. It at any rate kept the same rate of expenses up, without in-

creasing any revenues and entailed an additional amount of interest charge on the amount of capital we had to put in it for building the structure. In other words, it produced no increase in revenue, affected no decrease in expenses and did considerably increase the interest account.

# Cross-examination.

By Mr. EVANS, for the City of Memphis:

Q. Mr. Caldwell, when was the Cumberland Telephone and Telegraph Company organized?

A. I think it was in 1883, about that time.

169 Q. Was that the year in which that company bought out the Memphis Telephone & Electric Company?

A. Yes sir, it was about that time; it was all during that year.

Q. What was the capital stock of the Cumberland Telephone and Telegraph Company at its organization?

A. It was four hundred thousand dollars at the first incorporation, with the right to increase it to three millions of dollars.

Q. Was that all paid in at that time?

A. It appears to have been all taken and paid in at that time.

Q. I will ask you to give the names and amounts, of the stockholders as originally subscribed and indicated there?

— E. S. Babcock, Evansville, Ind.,.....	1810	Shares
M. G. Kellog, Chicago,.....	320	"
E. P. Huston, Evansville, Ind.,.....	530	"
E. T. Baker, Evansville, Ind.,.....	240	"
P. J. Marrs, Nashville, Tenn.,.....	400	"
E. P. Copeland, Nashville, Tenn.,.....	80	"
James Compton, Nashville, Tenn.,.....	100	"
B. S. Rhea & Sons, Nashville, Tenn.,....	200	"
E. M. Barton, Chicago,.....	320	"

Aggregating 4,000 shares of a hundred dollars each, making four hundred thousand dollars.

Q. The par value of the stock was one hundred dollars a share?

A. Yes sir.

Q. Mr. Caldwell, did any of those original subscribers of stock, hold stock in any other telephone company, or company engaged in the telephone business?

170 A. I have not the slightest knowledge of it. I had nothing to do with it at that time and know nothing about it. My impression is, however, that they had interests in telephone property in Nashville and Evansville, but I do not know it of my own knowledge.

Q. Was there any increase in the capital stock between the years 1883 and 1898, when the capital stock was \$1,695.00.

A. Yes, there were increases from 1883 up to 1900, in those periods along there. Right around 1883 and 1884 there was an increase of the capital stock to take in and pay for, in the consolida-



tion of various other properties in Indiana and Illinois and Kentucky and Tennessee, that went into the Cumberland Telephone and Telegraph company, and then when it made its permanent contracts with the American Bell Telephone Company for their patent rights, there was a further increase of stock made for them, in about 1888 or 1889. There was no further increase then in the capital stock of the company until the time I have mentioned in my deposition, that is to say, 1898.

Q. Mr. Caldwell, you spoke of the company paying some royalties on its instruments up to a certain year. What company was paid royalties on these instruments?

A. To the American Bell Telephone Company and the Western Electric Company. To the American Bell Telephone Company for the receivers and transmitters, and to the Western Electric Company for switchboards.

Q. Now for what years, for what length of time did you pay these royalties?

A. They were paid up to sometime about the latter part of 1900 or 1901; just what years, I do not recall, but as the various  
171 patents commenced to expire and run out, there was a diminution or decrease or lapsing of the royalties on them.

Q. What was the royalty paid on an ordinary telephone instrument?

A. It was in the beginning about fourteen dollars a year each.

Q. That was what year, about?

A. That was in 1883, about that time it was fourteen dollars and it was steadily decreased from that time on?

Q. How long did it remain at fourteen dollars?

A. I should say it ran that way for two or three years; I believe it was dropped to twelve, a few years that way, and then it was dropped again.

Q. What was the next drop?

A. They were about a dollar or two a year, something like that, a gradual decrease of them.

Q. Up to 1890?

A. There was a continued modification in the charge therefor.

Q. What was the year in which these royalties were discontinued altogether?

A. Somewhere in 1900, then there was no more royalty counted after that time?

Q. What was the royalty you were paying on these instruments in 1899?

A. Well, it was small then, but I do not recall what it was. It was a very small amount, perhaps it amounted to well, I don't know,

I don't recall, for the royalty account dwindled down to a  
172 point where it was about gone, then the whole manner of charging was shifted to a basis of the use of the instruments or the rental, or paid entirely for rental, so, just what it was that was left on it and considered then, is not fresh on my mind, but it was a few dollars, and that was each year for each instrument, but nothing like what it was before.

Q. I will ask you to look at your records and state what was the royalty paid in 1899?

A. I will do so, but I have not it in any of these books here.

Q. I will then ask you to examine the records of the company and state what the royalties paid by this company for each instrument was for the year- 1890, 1894 and 1899?

A. I will do so and file it as Exhibit No. 3.

Q. Now, you also stated that you paid some royalties on switchboards. To what company was that royalty paid?

A. The Western Electric Company of Chicago.

Q. What was the amount of the royalty in 1883 that you paid?

A. I would have to go to the records on that entirely.

Q. I will ask you then to file as Exhibit No. 4 to your deposition, a statement showing royalties paid to the Western Electric Company for each switch board for the years 1883 and for each year up to the time it expired?

A. I will do so and mark it Exhibit No. 4.

Q. I understand the royalty expired in 1900?

A. I don't know what year, but it was about that time.

Q. You have referred in one of your statements to the Cumberland Telephone and Telegraph Company being a subsidiary company to the Bell Telephone Company, I believe?

A. No sir, I do not recollect that I made any such reference as that.

172½ Q. Now I will ask you Mr. Caldwell how much of the stock of the Cumberland Telephone and Telegraph Company the American Bell Telephone Company, owns at the present time?

A. It owns about fifty-two per cent of it.

Q. When did they first become a stockholder in the Cumberland Telephone Company?

A. In 1888 or 1889.

Q. That is the company, the American Bell Telephone Co. to which these royalties were paid on these instruments?

A. Yes sir.

Q. State whether or not the Western Electric Company owns any stock in the Cumberland Telephone and Telegraph company?

A. No sir, and never did at any time that I recall.

Q. State whether or not there is any connection between the Western Electric Company and the American Bell Telephone Co.?

A. Yes, I think the American Bell Telephone Company owns a controlling interest in the Western Electric Company; I don't know it of my own knowledge, but I think it does.

Q. Now, Mr. Caldwell, how much rental did the Cumberland Telephone & Telegraph Company pay the American Telephone Company on each instrument in the year 1900 at the time at which the royalties were discontinued?

A. Paying at the rate of 4½% on the rental receipts.

Q. The American Bell Telephone Company gets 4½% of all the receipts.

A. Of the gross annual receipt- which we get for the instruments, for the service, and that 4½ per cent covers our right to any then

existing patent apparatus which they may have or afterwards acquire; a right to all their engineering facilities, which are very extensive; it includes protection against any litigation or trouble which it may have in the way of patent infringements, or, in other words for any claim, if anyone made a claim we were using an apparatus or device that was of their patent and right, it is the obligation of the American Bell Telephone Co. under this payment, to defend us against it and save us harmless entirely; any and all apparatus or material which we buy which has to be tested in a scientific manner, has to be done by them without charge to us. In other words, there are a great many items of value in the service which they are to render to us, covered under this 4½%, as it is all made in one bill, it is impossible to tell which part would be for instrument use and which part for engineering services, which part for patent use and patent protection. All these instruments are maintained at their expense; as soon as they become defective or are worn out, we send them back and call for others, and whenever there is new type of instrument brought out, we send back the old and get the new, without any additional expense.

Q. You say the American Bell Telephone Company is paid 4½% of the gross receipts of your company, from the rental of these instruments. About how much would that amount per instrument?

A. It amounts to about ten cents a month.

Q. Now, what other fixture does this 4½% rental cover, besides the instrument itself.

A. That is all, in the way of apparatus. That is all the apparatus they furnish.

Q. What do you mean by their furnishing engineering services?

A. They furnish us with engineering plans for any kind of construction work which we may have in contemplation, any 173½ switch-board device which we may wish to manufacture or have manufactured; any type of special apparatus which the customers may wish to have constructed. All those devices they will furnish plans and specifications for without further charge, or, we can get them elsewhere if we want to. It is a free thing on our part, and we can use it or not, but as an actual fact, we make a great deal of use of it.

Q. As a matter of fact, don't all electrical supply companies furnish such services as that, when you buy supplies from them?

A. No sir, they do not; cable makers do not. You have to furnish your own specifications to cable makers, and for switchboards etc.

Q. I am speaking of the apparatus?

A. That is what I am referring to. As far as the instruments are concerned, they furnish them to us, we just rent that outright. Now, when we buy a switch-board and cable and all the other vast amount of apparatus, we use, they will furnish the engineering plans for that for us, that which we buy in the open markets, or anywhere else; they will draw the specifications of what we want, and the manufacturers will make it for us. You must bear in mind, that the telephone is only one part of the apparatus used in the

system. The interior apparatus is very complicated and a very expensive affair.

Q. It is customary for companies furnishing electric light bulbs to furnish them free, isn't it?

A. I don't know; I have no knowledge of electric light companies; I have never had any interest in it or made any study of it.

174 Q. What is the value of an ordinary telephone instrument as now used?

A. They range from four to six dollars.

Q. What was the value of a telephone instrument, such as used in 1883 to 1885?

A. Why, about the same.

Q. What is the average life of one of these telephone instruments?

A. I suppose they run anywhere from one to ten years.

Q. What is the average life?

A. It would be about five years, may be six.

Q. Isn't it a fact that most companies manufacturing these instruments guarantee them for a period of eight years?

A. I don't know whether that is true or not.

Q. When these instruments are repaired, is it done at the expense of the Cumberland Telephone & Telegraph Company?

A. It is done at the expense of the American Telephone Co.

Q. Who pays these trouble men that the Cumberland Telephone and Telegraph Company sends out to repair the instruments that are out of order?

A. The Cumberland Telephone & Telegraph Company does.

Q. And the repairs then, or the cost of repairs, is stood by the Cumberland Telephone Co.?

A. No sir, not that character of repairs is meant. If the trouble man goes to the instrument and finds that the telephone itself is defective, he simply replaces it with a new one, replaces it, and sends it back to them.

Q. In cases then where the instrument is defective and has to be replaced, the American Bell Telephone Co. furnishes new instruments?

A. Yes sir.

175 Q. But where the telephone needs repairing——

A. In other words, when it is cheaper to repair it——

Q. Then, where the telephone instrument needs repairing the cost of this repairing is stood by the Cumberland Telephone and Telegraph Company?

A. In other words, when it is cheaper to repair it than for the man to take it down and ship it back; but, if cheaper to take it down and send it back, it is sent back, and in that case, they stand the expense of it.

Q. When these instruments and switch boards are taken out in large cities, such as Memphis, are they not often sent to smaller towns and put in use in the smaller towns and country places?

A. All the switchboards and apparatus which we taken out, if it is of any value, we make every effort to preserve that value and use

it anywhere and everywhere it would be most suitable and serve the best purpose in or out of Memphis.

Q. As a matter of fact, then, are instruments and switchboards which are taken out in Memphis or other large cities sent to country places and small towns and put in use?

A. Not always so.

Q. Are they ever used?

A. They are used indiscriminately, used back with other connections in the city or other customers, or sent to other places where they may have a demand for them or be needed?

Q. There is no preference given to the city over smaller towns, in the matter of equipments?

176 A. We do use a more expensive equipment and do give a better type of apparatus to large cities than to small places. There is no doubt about that. In other words, the type of switchboard used in Memphis would be folly to use or try to use in Holly Springs, and a switchboard used in Holly Springs it would be folly to try to use it in Memphis. As far as the telephone itself is concerned, that is the same type, as one and the same type is used universally. The style of a switchboard that would be used at Memphis, would be valueless at Holly Springs and vice versa, also the style of bell, as the signal bell on the instruments at Holly Springs would not work and would be useless at Memphis, and vice versa.

Q. In country places they have a little crank?

A. Yes, that was the magneto, and that was the system we used in Memphis in 1900 and it became obsolete, could not answer calls fast enough, the increase was so large, could not handle it, so, more modern, automatic type of switchboard had to be employed, and hence all the bells used with the old type had to be used with that type elsewhere.

Q. Passing now to that transaction with the Memphis Telephone and Electric Co., I believe you stated they were paid two hundred thousand dollars for their plant in the capital stock of the company?

A. Yes, \$220,000, that is what the records of the company show.

Q. With whom was that deal negotiated in Memphis?

A. I wasn't connected with the company at all at that time and had nothing to do with it until two years afterwards, but I have always understood that the Memphis side of the transaction was represented by General Carnes of Memphis.

177 Q. Who were the gentlemen controlling the Memphis Telephone and Electric Co. at that time who were the stockholders?

A. All I knew was Gen. Carnes; I didn't know any of the others and I never heard of anyone else except Gen. Carnes who seemed to be the factotum of the Memphis end.

Q. Do you know whether or not he was the sole owner?

A. No, I don't know; but he was so overshadowing I never heard anyone else's name connected with it.

Q. Who represented the Cumberland Telephone and Telegraph Co. in the negotiations and dealings?

A. I think Mr. Babcock of Evansville.

Q. He alone?

A. I think he alone represented the Cumberland Telephone and Telegraph side of it; he was the president and very active man of its affairs at that time.

Q. Do you know whether or not Mr. Babcock purchased that property down there himself, and afterwards sold it to the Cumberland Telephone Company or not?

A. I don't know how that was.

Q. You don't know whether or not the deal was made direct with the Cumberland Telephone Company or not?

A. No sir, I do not. These records show all I know about it. I was not connected with it, had nothing to do with it and was not personally acquainted with any of the men in the transaction at the time, so, of my own knowledge I know nothing about it. These minutes here show that the two companies traded with each other, and that the property was purchased by the Cumberland Telephone and Telegraph Co., and all its assets and franchises were assigned from that company to it. As to whether there was any side trading in it or not, I have not the slightest knowledge.

178 Q. Was Mr. Babcock at that time connected either with the Bell Telephone Co. or the Western Electric Co.?

A. No sir, he never had anything to do with them.

Q. Neither one?

A. No sir, never had any connection with either one of them.

Q. You spoke of certain city officials having recognized the right of the company to occupy the streets. What city officials were they?

A. I don't know just what they were called in Memphis; the men I have prominently in mind were Mr. Hadden, and Mr. Clapp; I had a good deal of business with both of those gentlemen and the City Engineer, one of whom was Mr. Merriweather, and I think the other was Mr. Bell, and then Mr. J. J. Williams of Memphis. I had a good deal of business with all of those gentlemen, but just what they were called I don't remember. They were the chief executive officers of the City of Memphis.

Q. Did the officials of the City of Memphis take any other action than just those permits you have exhibited with your direct examination?

A. I think there was more or less, and at times, resolutions passed by the council itself.

Q. Have you copies of those resolutions?

A. Only what was referred to here awhile ago.

Q. All the acts of the officials of the city have been referred to here and are exhibited to your deposition?

A. Yes, all I recall were referred to before. I had innumerable personal conferences with those men, Mr. Hadden, Mr. Clapp and

179 Mr. Williams and there was at no time that they were raising any question that we did not have a right to do business there, but mere matter of what would be called police regulations.

Q. You spoke of the franchise to do business in the City of Memphis, on your direct examination. Have you any other franchise



than the compromise agreement of the poll rental lawsuits that you speak of, dated in 1902?

A. I would not call that a franchise, that was a contract for settlement of disputes, and as I said, to buy peace with the City of Memphis, in connection with matters of this tax and poll rental. The franchise one that goes back to the one purchased from the original company which was organized and sold by Gen. Carnes, and under which it operated all along and received innumerable permits, in which the City traded and treated and trafficked with us during nearly a quarter of a century now.

Q. When you referred to the franchise of the company then, you mean the transaction you had with Gen. Carnes in buying out that company?

A. Yes sir.

Q. And these pe-mits you have exhibited here?

A. Yes. In addition to that, there was a special contract and permit in regard to the underground work which I do not see here, but there was a special contract about that specific work.

Q. Did you ever see that contract or permit which the council gave Gen. Carnes to do business in the City of Memphis?

A. I have an impression I did.

Q. Was it a written contract?

A. Yes, I have the impression I did see it, but I have not  
180 seen it in so long, we have been changed around in this office here, moving about again and again, so I could not swear I ever did see it, but I have an impression I did.

Q. What was the form of that contract?

A. It was in form of an application that Gen. Carnes made for the right to set up a telephone business and that was granted.

Q. Did you see the written action of the city council on that application?

A. When I say the original, it was a writing; whether it was the original of a certified copy, I am unable to say, for I certainly have not seen it in fifteen years.

Q. Do you remember the circumstances under which you did see it?

A. When I first came in here as executive officer, in my effort to go through the company's affairs and familiarize myself with all its details and papers; it was when the company had its officers on Market Street, and I have the impression that at that time there was such paper here, and in existence. Whether, as I say, it was the original or a certified copy, I could not say, but certainly it is, in all the conversations I had with the earlier officials of the City of Memphis, the respective parties did not seem to be in the least disagreement about that fact; there didn't seem to be the slightest disagreement between us and them that there was a franchise or grant as you may term it, given by the City of Memphis for this purpose, and that it had been duly and properly transferred to this company. In other words, they never raised the question, but the whole attitude of the minds of the parties was, that was a fixed fact, well understood, and all acting in conformity therewith, both the officers  
181 of this company and of the City of Memphis.



Q. Now, upon the ground of investment of money, on that question, continually investing money in each plant of the telephone company; when a new residence is put up say, in the city of Memphis, and a line of wire is run out to that residence, is the subscriber charged anything for running the wire out or putting up the poles?

A. Not a cent, provided he is within the corporate limits of the thickly settle- suburbs.

Q. Has that always been true?

A. Yes, I don't know of any exception to it. It has certainly been true ever since I have had anything to do with the Company.

Q. Then when the subscriber is outside of the city limits is any charge made?

A. Now that has been a rule recently made, when a subscriber is outside of the limit and in sparsely settled districts or localities, he is expected to do part of the work necessary to serve his private and peculiar purposes; but, as I say, that rule has only been made in the last twelve months. So far as the City of Memphis and its immediate suburbs are concerned, that rule does not apply. It would be in cases where you go out eight or ten miles from town, or something like that, farms or suburban places.

Q. In the year 1906—I refer to a paper that was handed you a while ago in which the operating expenses for the year 1906 are stated at \$70,624. The item of salary and wages is stated at \$60,174. Will you state of what that consists?

A. The item of salaries and wages?

Q. Yes?

182 A. That is the pay roll for the operators.

Q. Does that comprise any part of the salaries for general officers of the company?

A. No sir, that is intended to represent the pay rolls of the operators in the City of Memphis alone.

Q. Mr. Caldwell, have you the minutes of the Memphis Telephone and Electric Co.?

A. No sir, I have not.

Q. Did you ever see those minutes?

A. I don't know that I ever did.

Q. When the properties of that company were taken over, were its books and papers taken over too?

A. I have not the slightest idea, as I had not the slightest connection with either one of them at that time, or until two years after that, and I don't know anything about that. I never had any interest in the books of the Memphis Telephone and Electric Co., it was a thing I never was a stockholder in or interest- in, and I never made the slightest effort to try to get hold of them.

Q. The minutes are not among the papers and books of your company now?

A. No sir.

Q. Were any of the officers connected with the Cumberland Telephone and Telegraph Company, now, in any way connected with the Memphis Telephone and Electric Co.?

A. No sir, not a one of them.

Q. Were any of them connected with it at the time the Memphis Telephone and Electric Company was absorbed by it?

A. No sir.

183 Q. Did you ever see those minutes at all?

A. No sir I never did; I never had the slightest interest in them.

Q. You have spoken of the return on the capital from year to year of the various exchanges of the Cumberland Telephone and Telegraph Co. What was the return on the investment in Memphis for the year 1906?

A. \$22,151.00.

Q. Now what per cent was that on the capital invested?

A. 2.97%.

Q. What was the return on the investment in New Orleans for that year; have you that statement?

A. No sir, I have not those figures here.

Q. Have you issued any statement to the stockholders, or has your company issued it, for the years 1906 and 1907, showing the return on the investment of the whole company for those years?

A. It has not yet for 1907; it has for 1906.

Q. Will you give us a copy?

A. I will file a copy with pleasure.

Q. In referring to the capital stock of the company, you said that formerly the capital stock could be sold and disposed of very much more easily than it can at present. You stated also that from 1883 and 1898 the dividend was 5.31%; that from 1898 to 1907 the dividend was 6.56% and that for 1906 and 1907 I believe it was 7%. Now, I will ask you why it is that the present stockholders are not willing to invest in the capital stock, now it pays 7% when they invested in it so readily in former years when it paid only 5.31%?

184 A. There are two reasons, and one of them is, and the big reason, that they have some very grave doubts as to who owns the property. We don't know whether the stockholders own it or whether the city councils own it, or the legislatures, or, really, just who does own the property. And, I am serious and in earnest about that, for certainly as proprietors, we have very little voice in it. And the next thing is, that the returns that the business is showing, is not what return the stockholders expected it would show with the investment of additional capital put in it. Those two forces have brought about a state of affairs so that they are not in any hurry to put any more money in it.

Q. How can you tell that the dividend at the present time can be seven per cent?

A. How is that?

Q. You stated that this company was on a seven per cent basis now?

A. I mean by that, it has been paying up to the present time, recently, seven per cent per annum.

Q. That is for how many years?

A. Since about 1900, but, of course, I have no more knowledge

of what the future will bring forth than any other man, and I am not prophesying as to that. I was only stating and only intend to state, what was actually done up to the present time.

Q. What is the stock of the Cumberland Telephone and Telegraph Company worth on the market now?

A. About \$108, but within the last two months it has been down to \$93. and \$93.50, and as I say, at the present time, it is about \$108.

185 Q. That is not peculiar to the telephone and telegraph company stocks is it. There has been a slump and fluctuation in all the stocks?

A. It has been a little more than a slump; it has been a pretty violent panic on the country, brought about by a sort of political reign of terror that is in the air.

Q. That is the lowest it has been in several years?

A. Yes, that is the lowest it has been in eight years.

Q. What is the highest figure that it has reached within that time?

A. \$140.

Q. What year was that?

A. That was about 1903 I think.

Q. What has been the average value of it on the market for the last four or five years?

A. Around \$116 to \$120. I would say in that connection, the price of the stock before this panic was \$110.

Q. You say it was \$110. before the panic?

A. Yes sir, in the Spring and summer of 1907.

Q. How long before the panic?

A. Down to about July; it commenced dropping in July just as the financial skies commenced to get cloudy.

Q. You spoke of this property not being easily convertible as being one reason why capital stock would not now sell if issued. Is it any less convertible than telegraph properties.

A. No sir, I think not.

Q. Or even than railroad property?

A. No sir I don't suppose it is.

Q. Railroad stock and telegraph stock isn't it subject to that?

186 A. Railroad properties and telegraph properties are very much older; they have passed through more experience and as they stand today, they are better understood and their problems have been worked out more fully than the telephone business has.

Q. The public invests in railroad and telegraph stocks without any trouble, don't they?

A. Yes sir, as I say, for the reason that they are older and better known properties, and their problems have been worked out. The telephone problem has not yet been worked out and is an unknown problem.

Q. Are not the improvements just as great in the railroad and telegraph business as they are in the telephone business?

A. No sir, I don't know that they are. They are not so radical, at least I have not observed it that way.

Q. The return on the Cumberland Telephone & Telegraph Co. stock of seven per cent is sufficient to induce investors to invest in it, isn't it?

A. It does not seem so, sir.

Q. At seven per cent?

A. No sir, it does not seem to be so, for the reasons I have stated, for as I say we are not proposing to try the experiment of putting out an issue when we know as a certainty it would not be taken.

Q. It would not be on account of the dividend?

A. Yes, I think that is it; if it was earning more money and paying a bigger dividend it would attract more capital.

Q. In your opinion, if stock was issued at present, it would not bring par?

A. No sir.

187 Q. Although it is now on a seven per cent basis?

A. Yes, although it has a prospect of paying seven per cent, it would not bring par.

Q. Well, what is it that has made the public so timid about the telephone business and has not made them timid about the telegraph and railroad business?

A. As I put it before, and that is my belief, there is a most extraordinary, and I think unwarranted hostility towards the telephone, upon the part of the public authorities making it very expensive and very difficult for the business to be developed and handled, and they do not seem to be doing that at all with reference to the telegraph. I simply hear of no criticisms or remarks being made about the telegraph companies, no disposition to be regulating their affairs. Certainly nothing compared with the telephone. Everybody that comes along seems to want to take a hand in regulating the telephone rates, and as I say, the city councils now say they are the last chief bosses to do it, and the legislatures feel the same way, so, the business is referred to the courts to see what they are going to say about it; And in the midst of such as that, it is not comforting or reassuring to a man that is invited to go into it, to extend it, or enlarge it, he has to have a bait or temptation held out to him very much more than seven per cent to justify him in taking that hazard of chance.

Q. But the stock is selling at about \$108 on the market now?

A. Yes, and that seemed to be influenced very much by reason of the fact that there was going to be no more of it offered for sale or put out.

188 Q. How could the public know of that. Did the company adopt any resolution?

A. It is generally understood; well informed financial circles understand we are not going to do it.

Q. During the year 1907 are the earnings of the company as large as they were in 1906, or how do they compare?

A. About the same.

Q. No falling off?

A. Very little difference in it.

Q. Has the company any surplus account?

A. Yes sir.

Q. How much surplus?

A. It has accumulated a surplus of about three millions of dollars.

Q. How long has it had that surplus?

A. It has been accumulating it ever since it was in existence; been working at it for these twenty-five years.

Q. How long has the surplus been around or in the neighborhood of three millions of dollars?

A. It has been growing at the rate of about two hundred or three hundred thousand dollars a year for the last ten years.

Q. Now, you spoke of the rates steadily decreasing in Memphis. You mean by that, the average rate?

A. Yes, that is what I have reference to.

Q. The rate as to business houses has increased, has it not?

A. One class, the maximum rate, that is for the private individual line the rate was increased from five to seven dollars, when the lines were made metallic and the new form of instrument was adopted.

At the same time they put out other classes of service for  
189 business purposes that enabled business men to get service fully as low or for less money than they had been paying before, which really reduces the average rate. While it was increased to some, it was decreased to other.

Q. What is the lowest amount that is charged for residence telephones by your company in Memphis?

A. Now, a net rate of \$7.50 a quarter is the lowest rate we make.

Q. What do you mean by private line?

A. That is where *that* is only one party using the line.

Q. There are certain parties in Memphis who have a special contract with the Cumberland Telephone and Telegraph Company, by which they get the use of the telephone for less than seven dollars, aren't there?

A. Well, if there is, I don't have it in mind; there may be some old contracts, but I don't recall any.

Q. These contracts as I understand it, were made at the time there was a fight between the Local and the Cumberland Telephone and Telegraph Co. Do you recall that?

A. No sir; there was no business contract made at that time that had any reference to it.

Q. How about residence telephones?

A. There was a type of residence service that was put out then, a party rate, less than they are now, but we have quit taking any such contracts now. While we have not deprived those who took that form and taken it away, we are not taking any new contracts.

Q. What was that rate?

190 A. There were some for party rates; the two party rate, I refer to, was \$2.25 net per month, and then some four party rates, and six party rates, down, I think, as low as \$1.50 a month.

Q. Now, according to this statement for the year 1906, the in-

vestment in Memphis did not pay the Cumberland Telephone and Telegraph Company, did it, 2.97%?

A. No sir it did not.

Q. How about the investment of the company in New Orleans, for that year? Did it pay?

A. Paid better than it did in Memphis.

Q. How much better?

A. I expect fifty per cent better.

Q. What was the per cent of return in New Orleans for that year?

A. I have not it before me, so I can — say just what it is.

Q. Did it fall below the average of the company?

A. Yes, it did.

Q. How is it in Birmingham?

A. We don't do business there.

Q. How was it in Nashville?

A. Nashville was better than either one of them.

Q. Was it above or below the average?

A. Nashville is a little better than the average.

Q. How about Evansville, Ind.?

A. Evansville is a very good place; does very well.

Q. Is it above or below the average?

A. As to whether it was above, or much above, I could not  
191 say, but it was right up to it. Evansville is a very good point.

Q. How many telephones in use at Evansville, do you remember?

A. I should say about five thousand, between four and five thousand.

Q. And what is the rate charged for business telephones there?

A. \$5.00 or \$5.50.

Q. And for residences?

A. \$2.50.

Q. And that plant is above the average in its returns?

A. We have a good plant there and conditions are very satisfactory now. For a long time they were not, but it has worked around until now it is a very satisfactory state of affairs.

Q. In Evansville do you pay the city any part of your gross receipts?

A. Yes sir.

Q. What per cent?

A. Three per cent.

Q. Three per cent of the gross income?

A. Yes sir.

Q. Do you also allow the City of Evansville to use your underground wires, just as you do in Nashville and Memphis?

A. Yes sir.

Q. Do you allow them to use your equipment for fire alarm and patrol systems?

A. Yes sir.

Q. Free of charge?

A. Yes sir.

192 Q. Do you also allow *allow* them free use of telephones for the city offices.

A. We furnish a certain amount of free service, just as we do in Memphis?

Q. Do you know how much that is?

A. I think it is something like twenty telephones, but it is not as extensive as in Memphis; we don't furnish city schools and all of that.

Q. How many are furnished the city schools of Memphis?

A. We are furnishing Memphis more free service than anywhere else.

Q. You furnish that free service under the contract made in 1902, comprising the poll rental lawsuit, I believe. Is that correct?

A. In Memphis, for the City schools?

Q. No, for all the free service?

A. We did it before and are doing it since that contract you refer to in compromise, it didn't stipulate free service to the schools, although we did furnish it to them.

Q. I am not speaking of the schools particularly, but the free service to the city offices?

A. We put it in that contract, although we were furnishing it free before that time.

Q. Was that, or not furnished in consideration for that contract?

A. It was stipulated into it.

Q. Didn't furnish any consideration for it?

A. I don't know whether it did or not.

Q. You say you were doing it before?

A. Yes, we have furnished the City of Memphis with free service all along.

193 Q. How many free telephones are furnished the schools there?

A. I don't know sir.

Q. You don't pay the City any part of your gross receipts as you do in Evansville?

A. No sir.

Q. This \$33,200 that you spoke of being free service from about 1891 or 1892 to 1907, that free service which is now furnished is practically all now furnished under that contract entered into when the poll cases were compromised in 1902?

A. Yes, that is now.

Q. You said awhile ago, when talking about the Evansville plant, that there were certain different conditions there in Evansville from what they are in Memphis, that made that plant more profitable. What are those conditions?

A. General economics; the expenses are less.

Q. What do you mean by general economics and less expense?

A. Just what that would imply in a man's private affairs, that you don't have to spend as much money there as in Memphis.

Q. In what way do they have to spend less money?

A. I could not go into details, because I have not the figures in my mind; I just carry it in my mind that Evansville has worked



around where it is more satisfactory place and it is more profitable than Memphis is.

Q. I will ask you what other principal places there are where the returns are above the average, such as they are in Evansville?

A. Well sir, we are doing business in 520 different places, and for me to single them out, I have not them in my mind. I can say to you and do say, that all these large cities, all these ex-  
194 changes that have grown to be large, are below par, below what they ought to be, the best of them, and it comes around by reason of circumstance, which is generally known in telephony, the larger the exchange, the greater the expense that is on it, and it is our study and our aim to bring those places up and we are working on every one of them to bring them up. There are none of these cities that ought to show less than ten per cent on the money there, and when they show less than that, it is certainly unfair and unsatisfactory, and it can not permanently continue at less than that. In other words, if the communities are not going to pay rates that will show that profit then in the run of time, it will come to grief, one way or the other, they will have poor service or a restricted service.

Q. You are familiar with the affairs of the company all over the district it operates in?

A. Yes, I think I am.

Q. Will you just name some of the places or town- where the returns on the investment is above the average, such as Evansville?

A. I suppose out of the five hundred small places, for that is about what it is, the great majority of them are above the average, that is where the company is at present getting its vitalizing profits from.

Q. What population has Evansville, do you know?

A. No sir I do not, but it is about fifty or sixty thousand I think.

Q. Can you name any other places that are about the size of Evansville, that make a return above the average on the investment there?

195 A. Well, Evansville and that class, when I said Evansville was better, I did not mean to say Evansville is up to the ten per cent; it is not up to what it ought to be; there is not any city we are doing business in of over five thousand that is.

Q. But, it is above the average?

A. Yes, above the average of other cities of its size, but it is not up to what any of these cities ought to be paying use, but the company makes its average out of these vast number of small places and out of its telegraph and long distance service. That is where it gets its prosperity from.

Q. Can you name any other town the size of Evansville that makes as good showing as Evansville?

A. I think Chattanooga would; I am carrying it in my mind that way.

Q. How many telephones operated in Chattanooga?

A. Very nearly the same thing.

Q. How many is that?

A. About five thousand.

Q. What is the rate in Chattanooga?

A. There are only two rates; there is a business rate and a residence rate; we have no party lines and none of those frills which have been shown to prevent conducting the business in an economical way; there is a rate of \$4.50 in business houses and two and a half in residences, in Chattanooga. There are only those two rates, there are as I say, no party lines at all. Then, there is an additional rate for distances, that sets up very promptly there, that makes a remunerative rate.

196 Q. How is that?

A. There is an additional charge for distance beyond a certain radius from the exchange.

Q. What is that distance?

A. I think it is about a mile from the central office or a mile and a half. Beyond that point the distance rate grows very fast, and there is large and very profitable business outside of that area, on those Heights around Chattanooga, that pay a very good rate.

Q. What is the distance rate, the amount of it, that you speak of. How do you get at it?

A. So much each quarter of a mile added.

Q. How much is that?

A. Runs about twenty five to fifty cents a month.

Q. Is the City of Chattanooga given the same free service as in Memphis and in Nashville?

A. I can not be specific, but I will say that it has been a fixed policy of this company to give telephone service to the cities it is doing business in, in a liberal manner.

Q. And that is done in Chattanooga?

A. I think it is. If it is not. I don't know it, but I would rather be under the impression it is?

Q. Does your company give the free use of its equipment for fire alarm and patrol service there?

A. I expect it does.

Q. Does it pay any part of its gross receipts to the City?

A. No sir.

Q. Now, what conditions are there in Memphis that prevents the company from making an much money on the investment there as in Chattanooga?

197 A. Without getting the figures out, the main thing that is on my mind, is that for some time there has been a moving; the exchange looks like it was on wheels, changing grade lines, changing sidewalk lines, agitation about wages, and strikes and litigation and the Lord knows what all; the shifting of poles on every street, nearly in town, if not shifting from wire to cables, it is from cables to underground and from one side of the street to the other, and changing the grade lines, and shifting poles to that; it has been a continuous heavy outpour of money.

Q. The difference between Chattanooga and Memphis has been that there was been a strike in Memphis recently and that Memphis

has required the Cumberland Telephone and Telegraph Co. to shift certain poles. Is that correct?

A. It is more than certain poles.

Q. What poles have they required it to shift?

A. The shifting of routes where the sidewalk line would be changed; I don't know how many, and I could not undertake to say specific streets for they have been without number, and the city enlarged its area and took in that outside territory and it was built up largely before the corporation line was extended, and we put our poles as best we could, there was no curb line. Now, when the City took in all that area it established the curb lines, therefore the poles had to be reset and readjusted to that.

Q. When were they reset and readjusted?

A. It has been going on each year, ever since they took that district in, and some is on hand now.

Q. When did that readjustment begin; what year?

A. It has been going on each year, ever since they took that in.

198 Q. Since 1899, that was when the new limits began?

A. Well, it has been going on all the time.

Q. So, the *the* shifting of poles has been going on since 1899. Now, when was the order made by the City upon the company to shift its poles, and what were the terms of the order?

A. Simply make them from time to time, as the location and circumstances would call for it. There has been no general order.

Q. Can you file a statement of the cost that has been entailed upon the company by shifting these poles?

A. No sir, that would be utterly impossible.

Q. Could you give the number of poles that have been shifted?

A. No sir, that could not be done; it has been going on and I state it as a fact, that is has been going on steadily.

Q. Can you state on what streets those poles were re-quired to be shifted?

A. I could name some of them, Madison and Union Streets, were two cases.

Q. What parts of Madison and Union Streets?

A. Madison street, practically from the hospital grounds to the end of it, and in all that territory out there, it was shifting continuously, and in North Memphis?

Q. Was the shifting of poles on Madison and Union caused by the city being extended?

A. In establishing the grades or curb lines by the city. Madison Street had no survey on it at all, that is, extending it out.

Q. That was only out in the extreme part of Madison street?

A. It ran from the hospital just *behold* the old Memphis and Charleston depot, on out as far as it goes now. As an actual 198½ fact, Memphis is an expensive place to do business in and everybody doing business there knows it.

Q. But, at the same time, while living expenses are high the people pay well?

A. That is true with everything except the telephone. The fact is they have not shown much disposition to do that with the tele-

phone. The only cheap thing I know of in Memphis is the telephone service, the price that they are paying for their telephone service.

Q. You spoke awhile ago of the long distance connections furnishing increased facilities for the telephone subscribers in Memphis. That also puts an additional expense on the subscribers, does it not?

A. No sir.

Q. Wasn't the capital stock of the company increased in order to put these long distance connections in?

A. Yes sir, but it is not included in the capital to build that exchange at all. The capital that is invested in that, is not represented in the amount that we are there stating built the exchange.

Q. Was none of the expense of putting in other long distance connections chargeable to the investment in the exchange in Memphis?

A. No sir.

Q. How are the long distance tolls pro rates, that is, how do you arrive at the part of it that goes into the gross earnings of the Memphis exchange?

A. It is calculated at fifteen per cent.

Q. How do you arrive at fifteen per cent?

A. You mean why do we make it fifteen per cent.

Q. Yes?

199 A. That is the rate that other companies pay us when we connect with them. When we connect our lines with the exchange of another company, we allow them fifteen per cent of the receipts as their part of it; therefore, when we connect these lines with our own exchanges, we calculate it the same way, allow the exchange just the same as if it belonged to another company. In other words, that is the agent's commission and that pays. That capitalization is an entirely separate and distinct thing.

Q. You don't know how it is arrived at?

A. It is an arbitrary amount and why it is fifteen per cent is because it is thought equitable and fair.

Q. But, it is purely arbitrary as far as fixing that rate in Memphis is concerned?

A. It is not confined to Memphis, but it is applied to all places.

Q. Now, these long distance messages are paid for by the subscriber, in addition to his regular telephone rental, are they not?

A. Yes sir, so much for each time the lines are used.

Q. So, when the subscriber talks to a man over the long distance connection, and it costs say \$1.50, only fifteen per cent of that is credited to the gross receipts of the Memphis Exchange?

A. Yes sir.

Q. And the other eighty-five per cent goes to the general receipts of the company. Is that right?

A. Yes sir. But none of the capital that is employed in those lines are charged to the Memphis exchange; that is just as if it belonged to another company.

200 Q. What was the assessed value of the Cumberland Telephone and Telegraph Co. property for the year 1906 on which it paid State and County taxes.

A. You mean in Memphis.

A. Well, its whole property; what was the value of its whole property?

A. Over its whole territory?

Q. In Tennessee?

A. Why, I have no idea.

Q. Can you give it in Memphis?

A. Yes, it as all prorated you know.

Q. What was the assessed value?

A. I don't know what it was; it was all threshed out by the authorities at the capitol.

Q. You have not a statement here?

A. Our Auditor can tell you that.

Q. I will ask you just one other question Mr. Caldwell and then I am through. As a matter of fact then, all the fire alarm and patrol service, and the use of the conduit to the City of Memphis and the Free telephones to the city officers, are all furnished under the contract entered into in 1902 in compromise of these poll rental cases?

A. I think it is all referred to in that contract, but we did not stipulate to furnish *then* with the labor and material in that, which we are doing and have been doing, and which we are not doing anywhere else.

Q. You are not doing that under the contract?

A. The furnishing of labor and material, no sir.

Q. But you are furnishing free service, under the contract?

A. Yes, and more than it calls for.

201 Q. There is no contract by which you furnish the labor which you speak of?

A. No sir, we are doing it and have been doing it as a purely friendly courtesy and neighborly courtesy to the City, and we are not doing that anywhere else that we do business.

Redirect examination.

By Mr. GRANDBERY for Telephone Co.:

Q. You spoke of the company having a surplus. What does that surplus consist of, or, in other words, how is it invested?

A. Invested back in the property and being used by the public and upon which there is no dividend being paid.

Q. Is any part of it in money or interest bearing securities, Mr. Caldwell?

A. A very insignificant part of it is in interest bearing securities, not over five per cent of it is in. We use that back again in increasing the output of the company.

Q. Is that surplus absolute, or is it mere book-keeping?

A. Well, it is book-keeping. It is supposed to be the value of the property, that it is that much more than the capital.

Q. Are you paying an- dividends or interest upon that surplus?

A. No sir.

Q. All that the stockholders are getting out of it is their dividends on their stock, for which they have contributed dollar for dollar?

202 A. Yes, and which was actually issued to them, for which they paid the money?

Q. You spoke of the stock being quoted at \$108. Does that represent any part of the capital stock of the Company?

A. How is that.

Q. You spoke of the stock being quoted on the market as being worth \$108. Does that cover any material part of the capital stock of the company?

A. Those quotations are mere market quotations and indicate the varying results that are brought about by supply and demand. That is to say, when more buyers than seller, it goes up, or vice versa. It is a thing in which the company has no hand or concerns; that is the trading between individuals in the open markets.

Q. Does the trading in a year represent any material part of the capital stock of the company?

A. No sir.

Q. In other words, does any material part change hands in a year?

A. No sir, that represents a small amount that individuals would be offering for sale; but of course if there was a large amount of stock being offered for sale, for instance, something like three millions of dollars, it would not bring par.

Q. Mr. Caldwell, you were asked as to whether you had ever seen the contract between Gen. Carnes and the City of Memphis, the old contract which granted, as you claim, a franchise to him to operate a telephone exchange in Memphis, and you replied that you thought you had seen the contract at some time or another, either the original of a copy. Have you any clear, definite recollection on that subject?

203 A. No sir, I have not; I am simply giving expression to an impression.

Q. If you did see it, do you know whether you saw a copy or the original?

A. Well, as I say, I am just uncertain about it. I have the impression that I saw a paper that set forth the terms.

Q. Are you at all clear where you saw it. You have been frequently in Memphis, have you not.

A. Yes sir, I have been there many, many times.

Q. In connection with the business of the company?

A. Yes sir.

Q. Are you clear whether you saw it in the archives of the City or here in yours, or a copy of it in yours?

A. I am not, and I have, at the same time, an impression that I saw it on the record book there at Memphis on some of the City records.

Q. There are certain entries there which refer to it and give an idea about what it was about?

A. I have not any clear recollection of having seen the paper, and whether it was in Nashville or Memphis. I went for so many years with the fixed, definite undisputed understanding, with all this business and in all these transactions that were being carried on

between this company and the City authorities of Memphis, running over a period now of twenty-three years, during my time myself, for I was often, before I was executive officer there, and it all seemed to be there completely settled and understood, there was no raising of the question, no point made about it whatever.

204 Q. Did you attach any importance to it as a document?

A. I did not, in the slightest.

Q. Or attempt to fix in your mind the substance of the petition of Gen. Carnes?

A. I did not.

Q. You said your recollection was that it was an application for a franchise or permit, or the right to erect a telephone exchange in the City of Memphis and use the poles and wires in the streets. Do you remember whether Gen. Carnes proposed in that communication, in consideration of the granting to him of that right, to give them half rate telephones or free telephones or the right to use the poles and wires for the city fire alarm and police patrol systems?

A. No sir, I don't remember anything about that.

Q. You did not attempt to fix any of the terms in your mind?

A. No sir, I know I have not seen any such paper in the last fifteen years, and in that time so many things have happened, it would drive that out of my mind. But, as I say, all that was settled in my mind, it seemed to be, beyond dispute or question, and I had no occasion to dig it up or look at it or even think of it.

Q. So, whatever you say here or there, it was possibly a copy here, or the record there, or may have been the minutes there of the city council, as there are two or three entries?

A. That is what I am uncertain about.

205 Recross-examination.

By Mr. EVANS, for City of Memphis:

Q. The only action that was taken by the officials of the City of Memphis was with regard to the placing of poles, was it not. I mean, the action that you refer to on the part of those officials in acquiescence of your right?

A. What passed between us was as to how these things would be located, and on what streets. In other words, it was the adjustment of the structures; as to the right to have them in the city, that was not disputed or questioned for a moment.

Q. It was not discussed?

A. No, it was not disputed; it was all on the idea—of course you have the right, but just the manner of exercising that right, was the thing under discussion.

Q. The action on their part was the police power, with reference to the construction and location of your lines?

A. I suppose that is what you would call it.

Q. And the action on the part of the company was in that regard, only amounted to the fact that they did not dispute your right and you treated that as an acquiescence?

A. Seemed to be so well understood that we were asking for per-



mits to place poles on that street on this street, and that was the subject that was under discussion with us. Some places they would say, it don't suit to put them there, but put them here.

Q. The only contract in which you claim the right to the streets of Memphis is the right acquired through Mr. Sam Carnes, and the contract of 1902, isn't it?

A. I suppose that would cover the matter, substantially.

Further this deponent saith not.

JAMES E. CALDWELL.

H. BLAIR SMITH, called on behalf of Cumberland Telephone and Telegraph Co., being first duly sworn, deposed as follows:

Direct examination.

By Mr. GRANDBERY for the Telephone Co:

Q. State your name, age, residence and occupation?

A. H. Blair Smith, age thirty one years; residence, Nashville, Tenn.; occupation, Auditor of the Cumberland Telephone and Telegraph Company.

Q. How long have you been auditor of the company?

A. Over eight years.

Q. I will ask you if you have made up a statement from the books and records of your office, showing the earnings and expenses of the exchange at Memphis, Tenn., belonging to the defendant Company, for the years 1902 to 1907, inclusive?

A. I have.

Q. Will you attach that hereto as Exhibit No. 1 to your deposition?

A. I do.

Q. What per cent of profit does that statement show for each of those years?

A. 1902, 4.2%; 1903, 1.87%; 1904, 2.3%; 1905, 3.48%; 1906, 2.18%; 1907, 2.08%.

Q. Is that statement correct?

A. It is.

Q. Have you made up a statement showing the maximum rates charged by the defendant company for telephone services to its Memphis exchange for the years from 1884 up to 1908?

A. I have.

Q. Will you please file it as Exhibit No. 2, to your deposition?

A. I will.

Q. Is it correct?

A. It is.

Q. Have you made up a statement showing the average number of subscribers and the average price per subscriber and the gross revenue from the Memphis Exchange for the years 1884 and 1907 inclusive?

A. Yes sir.

Q. Will you file it as Exhibit No. 3?

A. Yes sir.

Q. Is that statement correct?

A. It is.

Q. Have you compiled a statement showing the free telephone service furnished to the City of Memphis from the year 1891 to 1907 inclusive?

A. I have.

Q. Will you file it as Exhibit No. 4 to your deposition?

A. I will.

Q. Why did you not go back to 1901?

A. I was not able to locate the records.

208 Q. Is that statement correct?

A. It is.

Q. Have you made up a statement showing the classification of rates and the amount each subscriber is paying at the Memphis exchange for local exchange service; if so, as of what date?

A. I have, as of date September 22nd, 1907.

Q. Why did you select that date?

A. This was the date you called on me for the statement to be used on the motion for temporary injunction.

Q. Is that statement correct?

A. It is.

Q. Will you file it as Exhibit No. 5 to your deposition?

A. I will.

Q. Have you made up a statement showing what would be the decrease in the revenues of the company at its exchange in Memphis in the event it should charge the rates provided in the ordinance passed during 1907 by the City council of Memphis?

A. I have estimated that.

Q. Is that correct?

A. I believe it to be.

Q. How much reduction does it show?

A. Almost twenty-six thousand dollars per annum.

Q. Will you file that as Exhibit No. 6 to your deposition?

A. I will.

Q. Will you file as Exhibit No. 7 a statement showing the earnings and expenses in detail, at the Memphis Exchange, for the year 1907?

A. I have prepared such statement and will so file it as Exhibit No. 7.

209 Q. Is that correct?

A. It is.

Q. I will ask you to state whether or not these various statements you have filed have been made up from the records in your possession, belonging to the company?

A. They have.

Q. Are you in charge of the accounting department of the Cumberland Telephone & Telegraph Co.?

A. I am.

Q. And have been, during the time you have been auditor?

A. Practically so.

## Cross-examination.

By Mr. McREE for Memphis:

Q. What was the earning capacity of the Cumberland Telephone and Telegraph Company for its entire system for the year 1907?

A. The per cent was about nine.

Q. Is that per cent upon the capital stock?

A. Upon the capital stock of the company.

Q. Or, is it nine per cent upon the estimated value of the Company's holdings?

A. Nine per cent on the capital stock.

Q. Does the estimated value of the Company's holdings exceed the capital stock?

A. The property of the company exceeds the capital stock.

Q. How much?

A. The difference is represented in our surplus and reserve for deferred maintenance account, approximately, as of December 31st, 1907, three and a half millions of dollars.

210 Q. Can you give, approximately, the per cent of earnings to the following large cities that are in your territory; New Orleans, Nashville, Louisville, Chattanooga and Evansville?

A. I cannot specify the percent but can say whether they are worse or better than Memphis.

Q. I will ask you then to prepare and file a correct statement showing the per cent of earnings in these respective cities named, and file it as Exhibit No. 8?

A. I will try to do so.

Q. Can you state from your independent recollection whether those towns named, that is, the rate of earning is better or worse than that in Memphis?

A. The majority of them are better.

Q. Please state which of those are better and which worse?

A. New Orleans has been put on a new basis in the last sixty days, and I believe it will far exceed Memphis; Chattanooga has been better for a year or two, and I believe will be better for 1907; Evansville will be better for 1907; Nashville will be better for 1907; Louisville, I am not certain about.

Q. Mr. Smith can you state any reason for the difference in the earnings of these respective towns named?

A. In the average rate charged and the expenses incurred in doing the business, both of them figure.

Q. The average rate of Evansville is much less than of Memphis, isn't it?

A. Yes sir.

211 Q. What is the reason for the increase of the per cent of earnings over Memphis?

A. The expenses are far less.

Q. Do you know how many telephones they have at Evansville?

A. Something over five thousand.

Q. The rate there is five dollars for business telephones; and two dollars and a half for residences?

A. I believe so.

Q. You also pay three per cent of your gross income to the City of Evansville?

A. Earnings from rentals.

Q. And you have an underground system there?

A. There is some underground.

Q. The underground, though, is not as extensive as that of Memphis?

A. I can not say.

Q. You furnish free telephones to the city government, and the fire department and police departments?

A. I am unable to say that from recollection.

Q. It is the policy of the Cumberland Telephone and Telegraph Company to furnish free telephones to the departments in every city they go into?

A. I believe that could be better answered by the president. I would have to examine the records of each city, as I have never undertaken to make a study of anything of that kind.

Q. Don't you know from the information obtained from the records in your office?

A. We do not give them in Nashville.

Q. You do in the majority of other cities?

A. I can not say whether we do or not.

212 Q. Do you know whether or not you give them in Chattanooga?

A. I Do not.

Q. You know they do, though, in Memphis?

A. I do, for I have recently made a study of it there.

Q. How about Louisville?

A. I can not say.

Q. Could you testify as to New Orleans?

A. No.

Q. You don't know what contracts you have with those cities?

A. I think I should explain this; I have a tremendous department, a number of men, and with the amount of detail going through the office, it is all systematized so I can in a few minutes put my hands on the information I want, and I do not burden my mind with the information.

Q. Do any of these larger towns I have named or other towns of the same size, pay a return upon the investment which would be the average that would equal nine per cent that you say was made in 1907?

A. I think some of them would come near it.

Q. There are a great many of them, though, like Memphis, that fall far below it?

A. Memphis falls below it.

Q. And New Orleans did fall below it?

A. Yes sir.

Q. From what places—I don't mean by this the name of the places, if too numerous, but what character of towns or exchanges

do you derive an income which offsets these losses that you suffer at towns the size of Memphis, New Orleans and Louisville?

A. A few exchanges would exceed that, but the exchange business is not a profitable business.

213 Q. From what source does the Cumberland Telephone & Telegraph Company derive its profits?

A. A combination of all its business.

Q. By that do you mean the long distance connections?

A. The long distance connections and local connections, that is practically the total of its business.

Q. Which is the most profitable of those two?

A. It has never been determined that I know of, exactly what expense is chargeable to one and what to the other. The nearest approach is to cover up the total expense incurred in the long distance by a percentage, to apportion the two, but, without the long distance business, the company would not succeed.

Q. And then you say, the long distance is the most profitable?

A. I could not say that, because if you were to eliminate the exchanges, you would eliminate some of the long distance; and if you eliminate the long distance, the exchange business would not be profitable.

Q. I base this supposition or question upon the idea that the long distance and local exchanges continue in operation, and ask you now, which of those furnishes the largest amount of income on the investment?

A. You want to separate them entirely, and you want me to separate them and tell you what expenses are incurred in running the long distance, and what in running the local exchange?

Q. I want to ask you first, which brought the revenue; if you wish to answer by separating them, you can do so?

214 A. I would have to answer that in this way. The earnings from the exchange business can be determined, and the earnings from the long distance can be determined; but, the expenses incurred in carrying on the two together, are so interwoven they are on the same basis that a railroad company's passenger and freight business are on, that the same clerk will handle both classes of business, the same operators will switch both classes, the same maintenance men will care for both; the same poles will carry both classes of wires, and, as to telling you what the net return from the total of the exchange business, throughout the territory, and the total of the long distance business I am unable to do it.

Q. Do you not, on your books, pro rate the expenses of the long distance business and charge it up to the respective exchanges?

A. We try to do that.

Q. Under your system of book-keeping, can you state which appears from that method of pro-rating of expenses, to be more profitable to the company, that is, the long distance or the local exchange?

A. The long distance business.

Q. What per cent of the long distance business expense is charged to the local exchanges through which the messages are transmitted?

A. The expense of the company is apportioned by exchanges, and each exchange is given a percentage of its tolls, which it is believed will compensate it for *holding* the toll business. In apportioning to the exchange its per cent of toll business, we used  
 215 the basis which we observed in settling with connecting companies and sub license companies. If they connect with us, or we connect with them, we divide the long distance business on the percentage basis, so much for operating, and in calculating the exchange's earnings and expenses, we include in the earnings that percentage of the toll business.

Q. You include in the earnings of the exchange, fifteen per cent of the toll business originating in that exchange, do you not?

A. Fifteen per cent of this company's, plus all originating business derived from other companies.

Q. Which is, fifteen per cent. of the messages?

A. Usually so. Some companies we connect with, I will say, though, do not give as much as fifteen per cent.

Q. Are they charged with fifteen per cent of the expense of maintaining the long distance line, or a larger or less expense?

A. The long distance lines and exchange lines are not clearly separated. If you will follow any route out of Memphis, you will find that line bears exchange lines and long distance lines. If the exchange were in existence without the long distance features, those same lines would exist within the radius of the exchange district.

Q. The local exchanges bear all expenses of operators and the maintenance, do they not, along those lines?

A. Within that distance. However, they do not stand the depreciation charge on the strictly long distance lines.

Q. I notice an entry marked instrument rental. Please explain what that is?

216 A. The telephones and transmitters, which are used by this company, do not belong to it? They are rented under a contract with the American Bell Telephone Company, which is the manufacturing company. For the use of those instruments we pay to that company, four and a half per cent of the gross revenue derived therefrom. That four and one-half per cent covers not only the rental of those instruments, but enables us to return any instrument, at any time, whether defective or not; it is optional with us or not whether we want the instrument- and we return them whenever they are defective or worn, or out of date and get new instruments for them without charge. We also get the electrical services of the experts that the American Bell Telephone Co. employs for the purpose of engineering both electricity and in surveying, and the benefit of patents that that company may have.

Q. You speak of four and a half per cent. About how much would that be upon a telephone or single instrument?

A. In 1902 it was \$1.84; in 1907, it was \$1.78 per year.

Q. That is for all classes of instruments, including the wall telephone as well as the desk?

A. They furnish only the telephone and the transmitter; they do not furnish the bell or any of the equipment, simply the tele-

phone and the transmitter, and the transmitter has an induction coil with it.

Q. What is the life of those telephones and transmitters?

A. Five or six years average.

Q. Don't the electrical companies making those telephones on the market advertise the life of them to be about eight years?

217 A. It depends altogether on the life of a telephone or transmitter, whether the man owns it or not. If it is somebody else's instrument, they don't care how long it lasts.

Q. You think if the individual owned the instrument, the care which ownership would dictate, would prolong the life so it would be much more than in case where it is rented?

A. The natural life of an instrument would be longer, but there is another thing to be taken into consideration and that is, how long it will be before there is an instrument gotten out that is better. We are now making changes of transmitters throughout the territory, because we have gotten a better transmitter, very recently.

Q. Do you think that the life of an instrument, with kind treatment, would be eight or ten years?

A. If it did not get out of date.

Q. Do you know what the price of those instruments is upon the market here?

A. About three dollars per set.

Q. Does the same price obtain for office telephones or desk telephones?

A. The same instrument is used in the office, on the wall and elsewhere.

Q. I have asked you to explain to me what is meant by telephone and transmitter, which you have done by illustration. I now ask you to state clearly in your deposition, what is the telephone and what the transmitter is also.

A. The telephone is the device, without the cord, which is placed to the ear. The transmitter is the device into which the  
218 speaking is done. It does not embrace the stand, or the bell, but does include an induction coil.

Q. You spoke of the American Bell Telephone Company furnishing you the services of electrical experts. What character of service do they render under your contract with them?

A. That is a question you ought to put to the engineering department or general manager, for the reason that I do not come in contract with the specifications and the engineering devices.

Q. I recognize that perhaps it is a matter that is not particular to your department, but I will ask you to answer that as best you can, in view of the lights you have before you?

A. Improvements are continually made in switchboards, in circuits and in methods of construction. The American Bell Telephone Company's engineers are closely in touch with the workings of all other prominent Bell engineers, and get all of their ideas, improvements and inventions, and we are given full benefit of them, without additional charge.

Q. Isn't it true that other electrical companies, having telephones



and transmitters for sale or rent, furnish to their customers a like service of advice to be had from their researches?

A. I don't know.

Q. Mr. Smith, in your deposition, you have presented a statement showing the amount of free service furnished to the City of Memphis, from 1891 to 1907. I will ask you to state if it is not a fact, that the free service furnished as shown by this statement, is furnished under the terms of a contract which was entered into in 1902 between the City of Memphis and the Cumberland  
219 Telephone and Telegraph Co. by which the City of Memphis released the Cumberland Telephone and Telegraph Company from poll rentals, up to the date of the contract, and the Cumberland Telephone and Telegraph Company in turn, agreed to furnish free telephone service to the engine houses, police station, Mayor's office and board of health and board of education, and agree to allow the construction of fire alarm and police patrol systems upon the top cross arms of their poles?

A. The statement furnished is itemized, and can be referred to the contract to see whether or not all service furnished free is according to the contract.

Q. With regard to an exhibit which you have filed, showing the classification of rates of the Cumberland Telephone and Telegraph Company at the Memphis exchange, I ask you to explain the rates bearing thereon, showing telephones at a gross monthly rate at from two dollars down — twenty-nine and one-sixth cents, and also per "D. H." "P. S".

A. In a general way, the contract for those instruments are different and the service varies. The majority of the instruments at those rates are connected to private branch exchanges; the next largest number are for extension sets; the third largest, for private lines, not connected at all to the Memphis exchange in the Memphis district, and others are for switchboard instruments used on private branch exchanges. The Telephones designed as D. H. are those used by the company, its officials, and the city, free; P. S. indicates pay stations, which are telephones located here and there in the city and are intended for the public to pay every time they are used, without anyone being responsible for the rental on them.

220 Q. I notice in making your estimate of loss in revenue for exchange service by an operation under the Crump ordinance, that you include a number of telephones where the rate is in excess of \$2.50 net, or a \$3.00 gross rate, but this statement does not include telephones having a rate of less than gross. Why were not those telephones included in the estimate of loss?

A. I do not understand that the ordinance will enable us in any way to increase the rates, but to force the subscribers who are now taking a cheaper class of service, to take a different class.

Q. In your opinion, if there was a lower rate given to the city of Memphis, complying with the Crump ordinance, would not there be an increase in the number of subscribers and consequently an increase in the gross revenues?

A. If a cheaper rate were put into effect, you might get more subscribers, invest more capital, and incur more expense.

Q. Mr. Smith, I call your attention to another exhibit to your deposition, which is marked Annual Rental Revenue, and I notice for the year 1907, there appears, average number of subscribers, 7,758. I ask you if that includes all of your subscribers, including the stations where the smaller amounts which have heretofore been referred to, are charged?

A. Includes all stations within the Memphis exchange district.

Q. Does that include all instruments?

A. All instruments in use.

Q. Does that include the instruments that are used as extensions?

A. Yes sir.

Q. And the instruments that are used in the hotels?

A. Yes sir.

221 Q. In fact, it includes all of the instruments which are referred to in your classification of rates which is attached as an exhibit to your deposition?

A. Yes sir.

Q. If I understand you correctly, in a case where an office has one set and there are two extensions, one to the stenographer's desk and one to the manager and one to the secretary's office, making three instruments in your estimate, you count each of those instruments as a subscriber?

A. Yes sir.

Q. Each instrument as a subscriber?

A. Yes sir.

Q. Can you state what the average per station would be, where the instruments which are used for extensions and those used in hotels, in the rooms, were not included?

A. I can not, for the revenue from the additional calls from the hotels are included in the exchange revenue. You might as well ask me the questions, do I include that station that pays \$13.50 as one of the stations.

Q. There is only one station paying \$13.50 is there not?

A. There is only one paying \$13.50, but there are many paying relatively high rates.

Q. The instruments appearing upon the classification of rates, to which you have referred as having one instrument for \$13.50 and which appear thereon as bringing a revenue over and above \$7.50, are all stations where special service is rendered or there is a mileage charge upon the instruments, are there not?

A. Yes sir.

222 Q. And that same special service and mileage rate would be charged upon the telephones under the Crump ordinance, the same as they are now charged under your present rates?

A. In my estimate, I have not included or considered any telephone located out of the City limits of Memphis would be reduced in rate.

Q. With regard to the Exhibit marked Earnings and Expenses, Memphis, Tenn., 1907, I wish to ask you with reference to certain

items appearing thereon. And first, I will ask you with reference to the item appearing under the head of general expenses, salaries and wages, \$9,517.48. How is that item determined?

A. The salaries of the president, General manager, treasurer, general counsel, auditor, with all of their office forces, salaries of the district super-tendent and his office force and such other general officers, are prorated among the exchanges on the basis of operating and maintenance expense incurred during the year.

Q. What is the salary of the president of the company?

A. Eighteen thousand dollars a year.

Q. Are there any other salaries connected with the general offices, that amount to as much as the president?

A. No sir.

Q. What is the next in amount?

A. Nine thousand dollars?

Q. Is that the salary of the general counsel?

A. Yes sir.

Q. The directory expense, under general expense, \$3003.06 I will ask you what that covers?

223 A. That includes the cost of printing and distributing the Memphis directory, together with the prorate of the salary of the manager of the directory department, his office force, rent, light, heat, etc. Included under miscellaneous earnings, such as are given, is the revenue which is derived from the advertising on the directory.

Q. Does that revenue equal the expense of the directory.

A. It does not.

Q. Please give the assess- value of the Memphis exchange, including distributable and localized property?

A. Distributable Property:

Shelby County .....	\$365,453
City of Memphis.....	243,716

#### Localized Property (Real Estate).

City of Memphis.....	72,500
Total City of Memphis.....	\$316,216

Q. I notice the item legal services, under general expenses. What does that include?

A. It includes attorneys' fees and expenses incident to lawsuits within the City of Memphis.

Q. Does that include judgments?

A. It does not.

Q. Where does appear the expenses that incurred in looking after the interests of the company before City councils, state legislatures and other deliberative bodies?

A. If such expense is incurred, it is charged to general legal, and apportioned on the same basis as general salaries, and wages. If such an expense is incurred in the City of Memphis, and is applicable to the City of Memphis, it is included in legal expenses. It

might be well to add, though, that the salary of the general counsel is included in general salaries and expenses.

224 Q. The item, legal expenses which I have reference to, appears under the head of general expenses and is the sum of \$10,134.40. I ask you if the general legal expenses incident to law-suits of the company, is prorated and that is included in this item, as well as the local defense of suits and prosecution of suits in the City of Memphis?

A. I think it would better answer your question, if I say by far the larger part of that legal expense was incurred directly in the City of Memphis. If you wish to see the items making up this account, they will be exhibited to you. The legal expenses for the year 1907 were unusually heavy on account of the strike and the litigation resulting therefrom. The legal expenses for the year 1906 amounted to \$4400.

Q. I notice the item of bad debts appear \$8,328.78. Is that an item that is carried over from year to year, or is it bad debts that were made during the year 1907 in the City of Memphis?

A. We try to keep our books as free from accounts which are bad as it is possible, and it requires at least ninety days to determine definitely whether an account is good or bad, and we do not charge them off until we believe they are worthless. This would bring about three months of 1906 bad debts into 1907, and carry about three months of 1907 bad debts into 1908.

Q. Under the operating expenses, I believe salaries and wages appear as \$58,083 and covers the expense of the switchboard operators, long distance operators and the managers and officials that are connected with the local exchange. Is that correct?

225 A. Part of the manager's salary is chargeable to maintenance, but on the whole, your statement is correct.

Q. The rent, light and heat, does the Cumberland Telephone and Telegraph Co. pay any rent in Memphis?

A. It pays rent to itself. It owns its real estate and charges up a rental equivalent to seven per cent and does not include real estate in the capitalization.

Q. That is a matter that appears here, to keep your books correct, and I believe I understand you to state the value of the real estate is not included in the value of the assets of the company?

A. It is not included in the construction of capital account.

Q. Incidentals, what does that cover?

A. That is unusually heavy for 1907, occasioned by the operators' strike. We had to provide meals for the working operators so that they would not have to go out to get them. That is what the largest part of that covers. Operating incidentals includes water used in the operating department, toilet articles, towels, etc., the matron in the operating department, traveling expenses of operators going to Memphis, but, as I say, mainly the meals served.

Q. Is the item of rent, light and heat, under the head of maintenance, charged up in the same way that the item of rent light and heat are under the operating department, that is it is rent paid to itself?

A. The rent is that which we consider the real estate we own, earns, and aside from that, we have heavy expense to provide light and heat.

Q. I notice the item of insurance. Does, or not your company carry its own insurance?

226 A. It carries its own insurance on the pole routes and on the equipment which is in subscribers', premises, but does not carry its own insurance on its building, switch-boards and other concentrated properties.

Q. Does the insurance item, under the head of maintenance, include insurance upon the building?

A. It does. The building is rented at seven per cent net, but the company takes care of it, that is, repairs it and keeps it in good condition.

Q. Keeps it in good condition and in turn, the exchange is charged up with rent and taxes on it, and pays seven per cent in addition.

A. It is charged up with seven per cent for rent, and the local exchange pays the taxes and insurance.

Q. The item of damages and compensation, what does that cover?

A. The results of law suits or compromises for accidents.

Q. I notice here an item of re-construction. Now, before going into that, I wish to ask you if your company makes a charge for wear and tear upon its plant, each year?

A. The life of a telephone plant, as everyone knows, is limited. No matter how carefully that plant is built, it is going to become worthless some day. The whole of the plant does not wear out at the same time. As parts of the plant are replaced, the cost of the original plant is charged to reconstruction. If the reconstruction done during a year equals seven and one-half per cent of the original cost, nothing is charged as depreciation; if the cost of reconstruction exceeds seven and one half per cent that is charged against a previous reserve. If the reconstruction cost during the year is less than seven and one-half per cent, then depreciation is charged with enough to make re-construction, plus depreciation, seven and one-half per cent of the original cost.

227 Q. Mr. Smith, with new improvements or new construction that you make upon a plant, is that charged to the plant or not?

A. It is.

Q. As I understand you, you charge the new construction to the capital account. Now, I ask you is this capital stock issued in fact or is the money which is used in this reconstruction, taken from the earnings of the plant and used for that particular purpose?

A. The extensions are charged to the capital account, and all money charged to the capital account comes from the sale of stock, or is borrowed capital. All money charged to reconstruction is from earnings. I can explain better what is charged to construction by saying, all additions to the plant, all improvements to the plant, and the excess value of re-construction of the plant, provided the reconstruction is on a better basis than the old construction.

Q. Now, to illustrate what I want to get at, I will ask you if a

line is run along the streets with small poles and a single cross arm, and later, the demand calls for a larger set of poles and double cross arms, what amount would you charge to the re-construction account or maintenance?

A. If the original pole route cost one thousand dollars, and the new pole route cost two thousand dollars, one thousand dollars of the new route would be charged to capital account and the other one thousand dollars would be charged to re-construction or expense account. If any of the old line taken down was of value, its value would be credited to the re-construction account.

228 Redirect examination.

By Mr. GRANDBERY, for Telephone Company:

Q. Mr. Smith, how long have you been connected with the company?

A. Fourteen years this month.

Q. During all that time where did a majority of the board of directors reside?

A. In Tennessee.

Q. At the present time, how many of the directors live in Tennessee, and how many outside?

A. Ten in Tennessee and five outside.

Q. State whether or not the affairs of this company have been managed by its board of directors or from some other source of from some other place?

A. They have been managed by the board of directors.

Q. Now, I will ask you to state whether or not there buildings are rented to the exchanges at actual cost or at their real value?

A. At actual cost?

Q. Then the exchange in Memphis, if it cost less than it is now worth, you would still rent it to the exchange at cost?

A. Yes sir.

Q. I want to ask you about this question of re-construction and additions to your capital account in exchanges. Take for instance the question of a switch board in the City of Memphis; assume that the switchboard cost fifty thousand dollars, and at the end of ten years had to be replaced with a switch board costing a hundred thousand dollars; how much would your capital account be increased when you installed the new switchboard costing one hundred thousand dollars?

A. Fifty thousand dollars.

Q. Would the capital account be credited with any part of the salvage in the old switchboard.

A. The capital account would not; the salvage is credited to the re-construction account.

Q. This surplus account and funds set aside for deferred maintenance. I will ask you to state in what form those funds are?

A. They have been reinvested in the plant.

Q. Now, assuming that the company's books show at the end of 1907, that it has earned nine per cent on its outstanding capital stock; it pays seven per cent by way of dividends to stockholders; now, this additional two per cent, what becomes of that?

A. The two per cent is invested in extensions and improvements of the plant.

Q. I will ask you to state whether or not it is possible for a telephone company to foresee all of the expenses of disasters that will overtake its various plants, from time to time?

A. It is absolutely impossible to do so.

Q. Is, or not it known that disasters of this kind will come, from time to time?

A. Yes.

Q. Has that been the experience of the company in the past?

A. Yes.

230 Q. State whether or not these reserve funds are intended to take care of these unforeseen disasters, or rather those known to come, but which can not be foreseen?

A. They are very necessary and are so intended.

Q. Can you illustrate with reference to any other company that you have in mind?

A. The Baltimore fire caused an immense loss and the earthquake at San Francisco practically wiped out the total capitalization of the exchange.

Q. Do you recall the difficulties that the Southern Bell Telephone and Telegraph Co. encountered during the year 1907?

A. They had tremendous storms along the Gulf Coast and some of their routes were torn up completely, and also some of their exchanges?

Q. Do you know what effect this had on the apparent surplus the company had accumulated from time to time?

A. I can not say. I can state the experience in our own company. A few years ago we had a sleet storm that followed the Ohio River, that caused this company nearly one hundred thousand dollars loss.

Q. Was that an unknown and unforeseen contingency?

A. It was not foreseen the day before it happened.

Further this deponent saith not.

H. BLAIR SMITH.

Sworn to when given, and subscribed before me on the 10th day of February, A. D. 1908.

\_\_\_\_\_,  
Notary Public.

231 STATE OF TENNESSEE,  
County of Davidson:

I Buford Duke, Stenographer and Notary Public, certify that the depositions of the foregoing witnesses, James E. Caldwell and H. Blair Smith, were taken before me as stated in the caption, that said witnesses were duly sworn, and that after transcribing said depositions on the typewriter, they were read over and signed by the respective witnesses.

Witness my hand and official seal, at Nashville, Tenn., on this the tenth day of February A. D. 1908.

[N. P. SEAL.]

BUFORD DUKE.  
Notary Public.

(Here follows Exhibit No. 1 to deposition of H. Blair Smith, marked page 232.)



**CHARTS**

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**TOO**

**LARGE**

**FOR**

**FILMING**

233

## EXHIBIT No. 2.

Cumberland Telephone & Telegraph Company,  
Memphis, Tennessee, Exchange.*Statistics of January 1st.*

Year.	Number of subscribers.	Direct Line Rates.			
		Business.		Residence.	
		Blake.	L. D.	Blake.	L. D.
1884 .....	582	*\$55.00	.....	*\$45.00	
1885 .....	802	*55.00	.....	*45.00	
1886 .....	966	*55.00	.....	*45.00	
1887 .....	1,092	*55.00	.....	*45.00	
1888 .....	1,176	*55.00	.....	*45.00	
1889 .....	1,283	5.00	.....	4.00	
1890 .....	1,454	5.00	.....	4.00	
1891 .....	1,522	5.00	.....	4.00	
1892 .....	1,515	5.00	.....	4.00	
1893 .....	1,484	5.00	.....	4.00	
1894 .....	1,361	5.00	.....	4.00	
1895 .....	1,333	5.00	\$7.00	4.00	\$4.00
1896 .....	1,417	5.00	7.00	4.00	4.00
1897 .....	1,599	5.00	7.00	4.00	4.00
1898 .....	1,681	5.00	7.00	4.00	4.00
1899 .....	1,879	5.00	7.00	4.00	4.00
1900 .....	2,430	5.00	7.00	4.00	4.00
1901 .....	2,937	5.00	7.00	.....	4.00
1902 .....	3,778	5.00	7.00	.....	4.00
1903 .....	4,572	5.00	7.00	.....	2.50
1904 .....	5,208	.....	7.00	.....	2.50
1905 .....	6,197	.....	7.00	.....	2.50
1906 .....	7,209	.....	7.00	.....	2.50
1907 .....	7,805	.....	7.00	.....	3.00
1908 .....	7,786	.....	7.00	.....	3.00

Yearly in advance.

NOTE.—Long Distance Set and Metal-ic Line introduced about October, 1894. Other rates are monthly but payable quarterly in advance.

234

## EXHIBIT No. 3.

Memphis, Tenn.

*Annual Rental Revenue.*

Year.	Average number of subs.	Revenue.	Average per station.
1907.....	7,758	\$289,031.26	\$37.25
1906.....	7,440	263,310.62	35.39
1905.....	6,697	230,618.10	34.44
1904.....	5,742	196,186.15	34.17
1903.....	4,838	174,252.79	36.02
1902.....	4,104	160,124.16	39.02
1901.....	*3,160	151,056.64	47.80
1900.....	*2,669	137,547.09	51.54
1899.....	*2,098	126,765.41	60.42
1898.....	*1,733	109,408.93	63.13
1897.....	*1,613	102,248.77	63.39
1896.....	*1,513	96,424.64	63.73
1895.....	*1,351	86,520.67	64.04
1894.....	*1,331	85,093.93	63.93
1893.....	*1,403	89,156.98	63.55
1892.....	*1,502	88,210.59	58.73
1891.....	*1,507	90,241.89	59.88
1890.....	1,476	83,830.33	56.80
1889.....	1,361	78,336.67	57.56
1888.....	1,219	68,208.35	55.95
1887.....	1,139	61,819.90	54.28
1886.....	1,019	54,066.96	53.06
1885.....	868	45,543.39	52.47
1884.....	694	37,590.31	54.16
1883, June to December only.....	507	13,891.81	46.97

\*Gross Revenue (June not full month.)

(Here follow Exhibit No. 4 and Exhibit No. 5 to H. Blair Smith's deposition, marked pages 235, 236, 237, 238, 239, 240, 241, 242, and 243.)

**CHARTS**

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**TOO**

**LARGE**

**FOR**

**FILMING**

## 244 EXHIBIT # 6 TO DEPOSITION OF H. B. SMITH.

## E-HIBIT No. 6.

*Estimate of Loss in Revenue Exchange Service at Memphis, Tennessee,*

## In Case Rates are Reduced on

Business contracts from \$7.00 net to \$5.00 net.

Residence " " 3.00 " " 2.50 "

lbs.	Business.	Rate.	Reduction per month.	Loss.
30		\$8.50 gross.		
19		7.75 "		
1		7.67 "		
80		7.50 "		
			\$2.00	
30				\$1,860.00
7		\$6.00 Net.	1.00	7.00
1		6.67 gross.	1.00	1.00
33		6.50 "	1.00	33.00
				<u>1,901.00</u>
	Residence.	Rate.		
43		\$3.50 Gross.	.50	\$241.50
19		3.25 "	.25	4.75
				<u>\$246.25</u>
	Loss from Business.....			<u>\$1,901.00</u>
				<u>\$2,147.25</u>
	Loss per Annum.....			\$25,767.00

This statement does not consider rates charged for trunk lines for Private Branch Exchanges, these being special contracts. Party line rates not considered.

## 245 EXHIBIT No. 7 TO DEPOSITION OF H. B. SMITH.

*Earnings.*

## Memphis, Tenn., Exchange.

		Average per sub.
Rentals.....	\$289,031.26	\$37.25
Proportion of tolls earned by exchange.....	18,346.37	2.36
Miscellaneous.....	3,680.62	.49
	<u>\$311,058.25</u>	<u>\$40.10</u>
Average number of subscribers.....		7,758
Cost of Plant.....		\$1,119,874.00
Tolls collected.....		97,189.36

## 246

## EXHIBIT No. 7 (Continued).

*Earnings and Expenses—Memphis, Tenn.*

## Year 1907.

		Average per sub.
Earnings: (See attached sheet).....	<u>\$311,058.25</u>	<u>\$40.10</u>
Expenses.		
General—		
Salaries & Wages.....	9,517.48	1.23
Rent, Light & Heat.....	400.73	.05
Traveling.....	1,302.39	.17
Postage, Ptg. & Sta.....	5,273.19	.68
Directory.....	3,103.06	.40
Taxes.....	14,011.09	1.81
Legal.....	10,134.40	1.30
Bad Debts.....	8,328.78	1.07
Incidental.....	1,819.19	.23
Total General.....	<u>\$53,890.31</u>	<u>\$6.94</u>
Operating—		
Salaries & Wages.....	\$58,083.00	7.49
Rent, Light & Heat.....	7,761.34	1.00
Adv. & Canvassing.....	2,947.55	.38
Incidental.....	10,402.00	1.34
Total Operating.....	<u>\$79,193.89</u>	<u>\$10.21</u>

## Maintenance—

Salaries & Wages.....	39,439.12	5.08
Rent, Light & Heat.....	1,156.28	.15
Material.....	2,358.02	.31
Traveling.....	8,838.55	1.14
Insurance.....	2,351.32	.30
Damage & Compensation.....	2,447.10	.32
Incidental.....	170.73	.02

Total Maintenance.....	\$56,761.12	\$7.32
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## Reconstruction—

Salaries & Wages.....	32,807.96	4.23
Rent, Light & Heat.....	948.80	.12
Material.....	27,216.21	3.51
Traveling.....	3,427.39	.44
Incidental.....	13.21	

Total Reconstruction.....	\$64,413.57	\$8.30
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Depreciation.....	\$19,576.98	\$2.53
-------------------	-------------	--------

Instrument rental.....	\$13,831.99	\$1.78
------------------------	-------------	--------

Total Expenses.....	\$287,667.86	\$37.08
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Net Earnings.....	\$23,390.39	\$3.02
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Per cent. Earnings to Investment.....	2.08	
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247

## EXHIBIT 8 TO DEPOSITION OF H. B. SMITH.

*Per Cent of Earnings for 1907.*

Nashville .....	6.52
Louisville.....	0.00
Chattanooga.....	6.14
Evansville.....	4.92
New Orleans, under new basis.....	3.68

## EXHIBIT 3 (Page 56) TO DEPOSITION JAMES E. CALDWELL.

*Average Rental and Royalty on Complete Sets of Instruments.*

1890.....	\$13.82
1894.....	8.45
1899.....	2.50

## EXHIBIT 4 (Page 57) TO DEPOSITION OF JAMES E. CALDWELL.

Royalties on Memphis Switchboards from 1883 to 1899 inclusive  
at the rate of \$1.00 per circuit per year.



248 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

VS.

THE CITY OF MEMPHIS et al.

*Deposition of Foster Hume, for Complainant.*

Filed February 25th, 1908. Dan F. Elliotte, Clerk.

The deposition of Foster Hume, taken by consent of counsel, all formalities being waived, and the right to except to the same, or to any part thereof, for incompetency and irrelevancy being alone reserved.

It is further agreed between counsel that this deposition shall be read as evidence upon behalf of the Cumberland Telephone & Telegraph Company in the above described case; this agreement being made for the purpose of preventing the necessity of taking the same deposition twice.

249 The said witness being first duly sworn, deposes and says as follows:

Direct examination.

By General WRIGHT:

1 Q. What is your name, age, residence and occupation?

A. Foster Hume; 36 years old; residence, 1394 Madison Street, Memphis, Tennessee, occupation, District Superintendent of the Cumberland Telephone & Telegraph Company.

2 Q. How long have you been connected with the Cumberland Telephone & Telegraph Company, and at what places, and in what positions?

A. I have been with the company about eighteen years; I started out with them at Nashville, Tennessee as office boy, working there on up to collector. From that position I was promoted to manager at Evansville, Indiana, and remained there about five years. From Evansville, Indiana I came to Memphis, as Local Manager, in March, 1898, and have remained here in Memphis ever since, and for the last three years have been District Superintendent.

3 Q. You say that from the time you came to Memphis, up to three years ago, you were Local Manager, what do you mean by that?

A. The Local Manager only has charge of the Local Exchange.

4 —. You mean the exchange at Memphis?

A. The exchange at Memphis.

5 Q. What do you mean by the term "District Superintendent?"

A. The District is composed of a number of exchanges, toll stations,

250 toll lines, etc. in a certain amount of territory. The District, at present, starts at Hickman, Kentucky on the North, and goes South to Jackson, Meridian and Vicksburg, on the South.

6 Q. Jackson, Meridian and Vicksburg, Mississippi?

A. Mississippi, Yes sir, (Continuing). All of those points are under my supervision.

7 Q. Where do you make your headquarters?

A. At Memphis, Tennessee.

8 Q. Mr. Hume, are you familiar with the location of the various poles of the Defendant Company in the City of Memphis?

A. Yes sir.

9 Q. Do you remember the fact of the enlargement of the City of Memphis, during the year 1889, by the Legislature of Tennessee?

A. Yes sir.

10 Q. About what was the area of the City of Memphis prior to this extension, I don't expect you to be precise?

A. I would say about four square miles.

11 Q. About what were the limits after 1899 when the boundaries were enlarged?

A. Do you mean square miles of territory?

12 Q. In square miles, if you know?

A. I would say about eleven or twelve.

13 Q. Are you attempting to speak with absolute accuracy?

A. No sir, it is just my impression of the area covered by the City limits.

14 —. Are you able to state precisely, or approximately, the number of poles in use by the defendant company outside of the original limits of the City of Memphis as fixed prior to this enlargement in 1899, and which are now included in the present enlarged City limits?

251 A. I can estimate it very closely from the fact that I have made a map showing the old city limits, and also the new city limits, and the routes that we had in that territory at that time. In estimating the poles at thirty-six to the mile in the territory that you speak of we had 2,039 poles.

15 Q. Do you mean to be understood by your answer to the immediately preceding question that there was, in the year 1899 when the city limits were enlarged, 2,039 Poles which were then, for the first time, brought into the city limits by the act of the Legislature enlarging the boundaries of Memphis?

A. I do yes, sir.

16 Q. Is the Memphis Telephone Exchange, owned by the defendant company, operated in the night as well as the day time?

A. Yes sir it is.

17 Q. During what hours, if any, is it closed, so that its subscribers cannot have the use of their telephones?

A. It is never closed.

18 Q. Do you mean you keep a night force of operators on to answer all calls during all hours of the night, as well as the day?

A. We do; yes sir.

19 Q. What, at this time, is the average number of telephone calls at the Memphis Exchange?

A. Well, that varies with the weather, the time of the year, and so forth; at the present time, on a clear day, it will average about anywhere from 105 to 110 or 115 thousand calls a day; when the weather is bad, why the percentage is larger, running as high as 130 thousand calls a day.

20 Q. Well, are there more or less calls during the winter or the summer season?

A. As a rule, there are more during the winter.

21 Q. Why is this?

252 A. Because a great many people leave the City in Summer, and the volume of business handled in Memphis in Winter is larger than in the summer.

22 Q. State whether, or not, the business of the Memphis Exchange has increased or diminished since your connection with it; and if it has increased, in what proportion?

A. Why the business has increased from approximately sixteen hundred subscribers, when I came here, to about seventy-nine hundred at present. This has been a gradual growth. There is no particular one year where we made any extremely large growth during that time.

23 Q. Are you able to say wh-ther, or not, the telephone is used by your subscribers more frequently of late years than of early years?

A. Yes sir, it has.

24 Q. Why is this?

A. Well, it arises from the fact that there are a great many more telephones in the city of Memphis now than there were years ago, which enlarges the area of talking, and the number of people they talk with, and it has become to be a factor in every business house and residence.

25 Q. Are you able to state what taxes the defendant company paid to the State, County and City during the year 1907, and two or three years antecedent thereto?

A. The taxes, of course, have varied for the last several years; I have some data here prepared on that subject; I will start out with the year 1904. Our total taxes that year for Memphis were \$8,243.96; for 1905, \$10,419.14; for 1906 \$12,187.18 and for 1907, \$14,965.82.

26 Q. Did these taxes, for the years you have named, include the State and County, as well as City taxes?

A. They do, yes sir.

253 27 Q. State the City taxes proper for the years you have named?

A. For 1904, \$3,729.80; for 1905, \$4,392.90; for 1906 \$5,664.32; and for 1907, \$5,545.55. This does not include the proportion of the taxes which are charged against the City of Memphis for ad valorem tax and privilege tax, that is paid by the company at Nashville to the Comptroller. In those taxes collected at Nashville by the Comp-

troller we pay so much apiece on each telephone box in use; also, so much per mile on the miles of wire in use in the City of Memphis.

28 Q. Do you know whether the tax thus collected by the comptroller is, by him, turned over to the City of Memphis?

A. I do not, no sir.

29 Q. State whether, or not, during the entire time of your connection with the Telephone Company at Memphis, there was an annual levy and demand upon the Company for taxes by the City, and whether said taxes were paid by the company?

A. There has been an annual tax on the Company ever since I have been connected with it in the City of Memphis, and the same has been paid.

30 Q. State whether, or not, the City of Memphis has any wires upon the poles of the defendant company, and if so, what?

A. The city of Memphis has wires on our poles in a great many places, and in some cases the wires are more than in others. These wires are composed of fire alarm wires, police alarm and call wires, and ringing circuit.

31 Q. Please explain what you mean by these several terms, "fire alarm" "police Call" and "ringing circuit"?

A. A ringing circuit is a circuit that is built—that runs from the fire engine house on Front Street and Union—number four I think it is—the fire headquarters, to the different engine houses in the City of Memphis, and on this circuit are connected bells, so that when there is a fire they can turn in alarms to the different engine houses by ringing these bells.

32 Q. I am not sure that I understand what you mean—that all of these bells can be rung on this circuit, what is the advantage and value of this service to the city?

A. They have also a telephone circuit, with city instruments connected on to them; and if one party should happen to take down his own telephone before they were through on the ringing circuit, it was possible to burn out the circuit, so it was necessary that the engine houses and the fire department should own a line that would not receive the ring, and it is necessary that the engine houses should all be on the wire at once.

— Q. You say "they" and "them" who do you refer to?

A. I mean the different engine houses located around the city?

34 Q. You mean that the fire headquarters, by means of this ringing circuit, can notify, at once, all of the fire engines houses in the city of Memphis, of fires, without danger of being cut out?

A. That is an independent line for the use of the fire headquarters for indicating fires.

35 Q. Now what do you mean by the fire alarm telegraph system?

A. Why they have fire alarm boxes located around the city—

36 Q. Who do you mean by "they"?

A. The City of Memphis (continuing)—The City of Memphis has public alarm boxes located at different points around the city, these boxes are to be pulled by any one discovering a fire, which automatically turns into the headquarters of the fire department, the alarm, and all of the various engine houses at the same time.

255 37 —. Now what is the police call or signal system which have wires upon the poles of your company?

A. The police signal system is a system by which boxes are scattered all over the city, and which include a signal and a telephone as well to communicate with the headquarters of the police department in the City; and it is used to notify the police authorities of trouble in any part of the city, and it is also to transmit alarms of fire; it is a sort of an auxiliary to the fire alarm system.

38 Q. How long, to your knowledge, have these various systems; that is, the fire and police alarm, and the ringing circuit, been on the poles of your company?

A. The fire and police alarm were there when I came to Memphis, part of them; of course, they — been extended from time to time; the ringing circuit was put up possible four or five years ago.

39 Q. You say that these various city wires are on a large number of your poles; about what proportion, would you say of all of your poles, are occupied by these various city wires; that is if you are able to state with any definiteness on the subject?

A. I would say about three-fourths of them.

40 Q. Do you pretend to be exact?

A. No sir, I just estimated that.

41 Q. Mr. Hume, is there what is known as a conduit district in the city of Memphis?

A. Yes sir.

42 Q. What do you understand by that?

A. The conduit district is the district where the wires are underground.

256 43 Q. In the case of the defendant company, are their wires underground in this district?

A. Yes sir.

44 Q. How are they placed underground?

A. These conduits are laid in the earth with man-holes at the intersection of alleys and streets; and in the conduits, why! cables are placed in them, which carry the wires of the company.

45 — Do you know whether, or not, that conduit system was constructed in whole, or in part, by the defendant company?

A. It was constructed by the Company.

46 Q. Was it expensive, or not?

A. Yes sir, it was.

47 Q. Can you give the amount of the cost of its construction?

A. No sir, I cannot.

48 Q. It involved, however, many thousands of dollars?

A. Yes sir.

49 Q. Has the City of Memphis any space in the conduits which the defendant company built?

A. Yes sir; they have practically one duct over our entire system.

50 Q. You mean the City has one duct in your conduit?

A. In our entire underground system; yes sir.

51 Q. How many wires are in this conduit; that is, city wires?

A. That is impossible for me to answer; they have different size cables in different localities; I am informed by the city Electrician that there are from two to thirty wires in each cable.

52 Q. Are you familiar with the cost of the construction of tele-

phone lines; that is, the *cosy* of poles, wires and the appliances which go to make up a telephone system?

A. Tolerably familiar, yes sir.

257 53 Q. Is it a part of your business to know?

A. Well, up to a very short time ago we made requisitions on our general office for all supplies, without knowing the cost of same. Within the last thirty days, they have furnished is a price list of this material; so, therefore, I am not as familiar with the cost of all of the material as I would have been if we had this information to work on.

54 Q. Whilst you are not familiar with the precise cost, you are familiar, generally, with the cost of poles, wires and electrical appliances?

A. Yes sir.

55 Q. If the City had to establish a s-perate system of its own, Mr. Hume, for its fire alarm, police signal and ringing circuit systems what, in your opinion, would it cost?

A. Covering the area that they cover at present it would cost them possibly \$50,000.00.

56 Q. Do you mean poles and all?

A. Yes sir; it would cost them \$100,000.00.

57 Q. What would it cost the city to maintain annually—for the annual maintenance of such a system, if it had to depend upon itself for that service.

A. About twelve or fifteen thousand dollars.

58 Q. Do you mean a year?

A. Yes sir; that is not taking into account for the depreciation of the plant.

59 Q. How much do you allow for that?

A. Seven and a half per cent.

60 Q. Per annum?

A. Yes sir.

258 61 Q. Is this figure of 7½ per cent per annum for depreciation the one adopted by your company?

A. Yes sir.

62 Q. Do you know whether, or not, this is a reasonable figure?

A. I believe it is, yes sir.

63 Q. Mr. Hume, do you know who, as a matter of fact, has maintained up to the present time, and is still maintaining the fire alarm and police alarm and ringing circuit systems of the City of Memphis?

A. I would say that the Cumberland Telephone & Telegraph Company has practically done so.

A. That is, from the time that I have been connected with them company?

A. That is, from the time that I have been connected with them in Memphis.

65 Q. What do you mean by saying "that they have practically done it?"

A. I mean in cases of general breaks, sleet, storms, fires, or other contingencies that might arise, that the Cumberland Telephone & Telegraph Company have furnished its own men and material to

A. The police signal system is a system by which boxes are scattered all over the city, and which include a signal and a telephone as well to communicate with the headquarters of the police department in the City; and it is used to notify the police authorities of trouble in any part of the city, and it is also to transmit alarms of fire; it is a sort of an auxiliary to the fire alarm system.

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59 Q. How much do you allow for that?

A. Seven and a half per cent.

60 Q. Per annum?

A. Yes sir.

258 61 Q. Is this figure of 7½ per cent per annum for depreciation the one adopted by your company?

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A. That is, from the time that I have been connected with them company?

A. That is, from the time that I have been connected with them in Memphis.

65 Q. What do you mean by saying "that they have practically done it?"

A. I mean in cases of general breaks, sleet, storms, fires, or other contingencies that might arise, that the Cumberland Telephone & Telegraph Company have furnished its own men and material to

replace what has been destroyed by the elements of fire, or in any other way to put the police alarm and fire alarm wires back to work without being paid for it by the City.

66 Q. Are you acquainted with the rentals paid by other companies to the defendant Company for the use of its telephone poles, and by the defendant company to other companies for the same use?

A. Yes sir, we have arrangements of that kind in different localities.

259 67 Q. You mean that you have other Companies engaged in the telephone or telegraph business, which rent part of your poles for the use of their wires, and that your company, in some cases, does the same thing with other companies?

A. Yes sir.

68 Q. State what is the tariff or charge for such services?

A. There is a tariff for that, and the rates varies according to the line you are occupying; whether City, or Country, and the condition of the route generally?

69 Q. Give the rates if you can?

A. The rates, as I understand them, run from 25¢ per attachment per year to 37½¢ per attachment, per year.

70 Q. What do you mean by "per attachment?"

A. Per attachment means one wire.

71 Q. One wire on one pole?

A. One wire on one pole.

72 Q. Well, now, for a mile then, say at 25¢, how much would that be?

A. \$9.00, considering 36 poles to the mile.

73 Q. Is that the proper number?

A. That is what we have estimated the poles to average in the city of Memphis; on pole lines that we have recently built, we estimate 40 poles to the mile.

74 —. You are now using more poles than formerly?

A. Yes sir.

75 Q. If the city of Memphis then paid your company, as other wire using companies pay it for the same service; that is, for being allowed to use your poles and attach their wires thereto, how much per annum would the cost be to the city, taking into consideration the number of poles that they now have with their wires on in  
260 the city of Memphis?

A. It would be approximately \$3,500.00 per annum.

76 Q. In the rental charge thus made between your company and the other companies, and vice versa, does that include the service of the lessor company of keeping up the wires of the lessee company?

A. It does not; no sir; we rent them the pole space; they attach their wires to it with the insulators, or brackets, or cross-arms, or whatever form of attachment they must string their own wire, and maintain it.

77 —. Does your company rent space in its conduits in the City of Memphis to other companies?

A. At the present time, we are not, but we have rented them.

78 Q. What was the charge made?

A. Six cents per foot per year.

79 Q. Now is this charge, and the charge of 25¢ and 37½¢ per attachment which you have mentioned before, a reasonable charge in your opinion?

A. Yes sir, I think it is?

80 Q. By the way, I neglected to ask you—how many feet are used in the conduits of the Defendant Company in the City of Memphis by the City?

A. I would say three and one-half miles.

81 Q. What would that amount to per annum at the rate which the other companies pay you?

A. About \$950.00.

82 Q. Mr. Hume, there has been some evidence given as to the obstruction of streets by the poles of the defendant company in the streets of the City of Memphis; what, if any, actual obstruction is it to the use of the sidewalks by the citizens and public generally—created by the setting of your poles?

261 A. Why the sidewalk space is diminished in proportion to the diameter of the pole. From an obstruction point of view to the public travel, there are few cases where the obstruction would amount to anything.

83 Q. What do you mean when you say "that there — only a few places that would amount to anything"?

A. I would say, take Myrtle street for one case, where the sidewalks are not over three or four feet wide, and by setting your poles in the sidewalk you would leave the space of the sidewalk between the fence for travel not over eighteen inches or two feet.

84 Q. Has your company any poles on Myrtle Street?

A. They have not, no sir.

85 Q. What other street- of the City of Memphis are there, of your knowledge, in which the sidewalks are as narrow as Myrtle street, and in which your company has set poles?

A. For a very short distance on Madison Street, just east of Dunlap Street, there is, at present, a cinder walk which is not the width of a standard walk, and our poles at this point are within about three feet of the fence line or property line. We also have a route on Manassas street where the sidewalk is narrow which might cause some interference if two or more people desired to walk on the sidewalk at once and carry umbrellas. Also, for a distance of about 400 feet on Dunlap street. Outside of these points I am unable to recall any more narrow places at present.

86 Q. What distance on Madison street is the sidewalk only about three feet in width?

A. Not over 300 feet.

87 Q. What distance on Manassas street.

262 A. Where the Cumberland Telephone & Telegraph Company has poles it would possibly be three blocks.

88 Q. What is the length of a block?

A. I would say from four hundred feet to five hundred.

89 Q. What is the total mileage of streets occupied by your poles and wires in the City of Memphis?

A. 153 miles and a fraction.

90 Q. Mr. Hume, are you informed as to the number of free telephones furnished by the defendant company to the City of Memphis at this time?

A. I could not say exactly the number they have, but I know they have a number of them.

91 Q. You could tell by looking at your books?

A. Yes sir.

92 Q. But you don't carry in your memory, at this time, the exact number?

A. No sir; I do not.

93 Q. Have you made any estimate of what it would cost the City if it paid for the telephones which it uses at the same rates as other subscribers?

A. Yes sir, I have.

94 Q. How much?

A. For the year 1904, it would be \$3,478.93; for the year 1905 \$3,983.41; for the year 1906, \$4,222.05; and for the year 1907, \$4,916.05.

263 Cross-examination.

By Mr. McREE:

95 Q. Mr. Hume, with regard to the obstruction that the poles furnish to the sidewalks, I will ask you, in the first place, if it is not a fact that the poles are set six inches from the curb line of the sidewalks?

A. No sir, they are not.

96 Q. Is not that the requirement of the City Electrician on order to prevent the hub- of vehicles striking against the poles?

A. No sir; not according to my understanding.

97 Q. How close are they set to the curb line?

A. Right at the curb.

98 Q. Is the curb six inches?

A. Usually it is, yes sir.

99 Q. So that it is six inches from the outside of the pole to the outside of the sidewalk?

A. Yes sir.

100 Q. And the poles range from one foot in diameter to two feet in diameter, do they not?

A. A two foot pole is an exceptional pole.

101 Q. Some of them go higher than that, do they not?

A. I am unable to recall any that is over two feet.

102 Q. Is it not a fact that, at the point where these poles are placed in the sidewalk that, in order to have the same sidewalk facilities, it is necessary to have the side walk from a foot and a half to two feet and a half wider than it would be if the pole was not placed there?

A. It depends entirely on the size of the pole that you would want

to put in that location; and in some locations it would be necessary to enlarge the sidewalk for the pole.

264 103 Q. Then, at such a place, it would be necessary to have the sidewalk from one and a half to two and a half feet wider than otherwise in order to have the same facilities, is that correct?

A. It would; yes sir.

104 Q. Have you examined the city with a view of finding out the sidewalks that are narrow upon which these poles are situated?

A. I have not, no sir.

105 Q. And your statements with regard to the streets upon which the sidewalks are narrow, and the obstructions exist are based only upon your recollection of those particular streets?

A. Yes sir.

106 Q. Which was called to your attention by the testimony of other witnesses with regard to the street being obstructed; is not that the fact?

A. Well, these particular streets were. Yes sir.

107 Q. I will ask you if you know the location of the poles, and the width of sidewalks throughout the city of Memphis?

A. Yes sir; I am very well acquainted with the location of poles, and the width, as a rule, of the sidewalks.

108 Q. But you state that you did not examine the city with a view of finding out where the poles obstructed the sidewalks to the extent stated?

A. No sir, I have not.

109 Q. Is it not a fact that the poles bear a large number of wires and have cross arms on them?

A. Some of the poles have, and some of them do not.

110 Q. The majority of them do?

A. It is according to what you mean by "a large number?"

111 Q. What is the average number of wires carried by a pole in the City?

A. Do you mean upon wires, or cables.

265 112 Q. Both?

A. That depends upon where the poles are located.

113 Q. What would you say, the maximum, or minimum?

A. I have never seen a pole that would carry the maximum amount of cables. We have poles carrying ten cables; these cables are anywhere from a twenty-five pound cable which carries fifty wires to a two hundred pound cable which carries four hundred wires. This same route, at different points, will have as many as seven cross-arms on it, and at other points, on the same route, it will only have two cross-arms on it; the ultimate capacity of each cross arm is ten wires.

114 Q. How long are these cross arms?

A. About nine feet.

115 Q. These poles that were located outside of the city limits of Memphis prior to 1899 were included in the annexed territory by the annexation of that year; I will ask you if there was any special permit from the county or state by which these poles were erected.

A. Those poles were erected prior to my time in Memphis, and I am unable to answer that question.

116 Q. As Local Manager, and District Superintendent have you had such contracts or permissions brought to your knowledge?

A. I have not; no sir.

117 Q. Do you know whether, or not, the Cumberland Telephone & Telegraph Company went before the County Court of Shelby County, Tennessee to apply for a right to erect poles through its roads?

A. To my knowledge, they have not: It is my understanding that the Cumberland Telephone & Telegraph Company had the right from the State to build through any county road outside of the City of Memphis.

266 118 Q. That is your opinion of a proposition of law, is it not?

A. I said I understood that the Cumberland Telephone & Telegraph Company had the right; I got that information from some of the telephone officials.

119 Q. Do you know whether that was from an attorney or otherwise?

A. I think it was from the General Manager and President.

120 Q. You do not go to an Attorney to find out what your rights are?

A. After we confer with the higher officials of the Company—if they instruct us to do so.

121 Q. They got their information from any attorney, did they?

A. Part of it, I presume; yes sir.

122 Q. I believe you stated there were 2,039 poles in this annexed territory at the time it was taken in,—approximately?

A. Yes sir.

123 Q. Now with regard to the Taxes as testified to by you; I will ask you if the State and County tax referred to does not include the State and County tax for the entire Shelby County?

A. No sir, that is just for the City of Memphis.

124 Q. Do you know what the State and County tax was that was paid by your company in Shelby County for the years referred to, beginning at the year 1904 to the year 1907?

A. No sir, I do not; I can refer to our books and give you that information.

125 Q. Will you refer to your books and get me a statement showing the amount of taxes paid for State and County taxes in Shelby County, and the valuation at which the properties were assessed, and the amount of taxes paid to the City of Memphis, proper, including the amount of the value at which they were assessed, for each of the years you have named, beginning with 1904 and including 1907?

267 A. Yes sir; I will get you that information.

126 Q. You spoke of a tax paid the Comptroller upon each telephone box or instrument; I will ask you if it is not a fact that this tax is paid in lieu of all other taxes; except the ad valorem tax?

A. As I understand it, it is not.

127 Q. If the statutes of Tennessee are to the contrary, you are mistaken, are you not?

A. If I am not mistaken, why the City of Memphis is the only City or town in the State of Tennessee that forced us to pay that tax, even after we got the records and the law books and showed them, in lieu of other taxes, that is all we had to pay. My understanding is that the bill was passed with a certain clause in it, but the engrossing clerk omitted this clause, and this clause omitted all other taxes,—which the engrossing clerk left out in enrolling the bill.

128 Q. I will ask you if you have made any examination of your records for the purpose of ascertaining this fact, or is this merely your understanding of the fact, as to the City receiving a part of the tax paid to the compt-oller for instruments and for mileage on wires?

A. The Company sent a special agent down here to confer with some of the County officials, and various city officials, regarding this clause that was omitted, endeavoring to keep from paying the taxes, and I understand that they were unsuccessful, and so understand from the party that was sent here, and from the General Attorney of the Company.

129 Q. You do not know anything with regard to that of your own knowledge?

A. Except that I was with the Party and went around to see some of the different county officials with him when he was in Memphis; but so far as the amount of the tax that we paid, and when it was paid, I do not know.

268 130 Q. Do you mean to state, positively, of your own knowledge, that any of the tax, for what you have termed "Instrument tax" and wire and mileage tax was ever paid into the treasury of the City of Memphis?

A. No sir, I could not say that it was paid into the city of Memphis; I will say, however, that the company had me to get up the amount of miles of wire we had in the City of Memphis so that I could report on it.

131 Q. Can you state whether that was for the purpose of reporting to the comptroller as a basis to pay the tax which is in lieu of all other taxes, or whether it was for the purpose of paying to the City of Memphis a tax?

A. No sir, I could not say.

132 Q. Mr. Hume, are you familiar with the contract entered into between the city of Memphis and the Cumberland Telephone & Telegraph Company, in 1902?

A. I do not recall the contract by the date; but if I saw the contract I could tell you more about it.

133 Q. I will state that this is a contract made by which the City of Memphis agreed to dismiss a suit pending for pole rentals accrued to that date, and the Company, in turn, agreed to furnish it certain service and pole accommodation; do you recall such a contract as that?

A. Before the contract was made, our General Attorney requested me to furnish him a list of the telephones that were being used by the city of Memphis, and what they paid for each telephone so that



he could figure on this contract with them. Later on he notified me that he had entered into a contract with the city, providing to give them certain telephone service in settlement of the pole rental suit.

269 134 Q. Is it not a fact that the pole service for the ringing circuit of the fire department was one of the considerations furnished by the Cumberland Telephone & Telegraph Company under that contract?

A. As I remember it, it was; yes sir.

135 Q. Is it not a fact that the fire alarm system, or wires, was one of the considerations?

A. I do not remember that, no sir, I do not know exactly whether that was one of the terms of the contract; as I remember it, we agreed to extend to the different fire engine houses of the City—build the wires for transmitting telephone messages and fire alarms through what is known as their fire and police circuits. Of course, I am speaking from memory and not from a recent inspection of the contract.

136 Q. What I wish to get at is to ascertain if the service of free telephones and of pole space which you have referred to as being furnished to the City of Memphis, are not furnished under the terms of that contract which was entered into in 1902?

A. I would say not.

137 Q. What part of it is not covered by that contract, if you can state?

A. The part that was in effect prior to that time.

138 Q. That is your consideration of the contract?

A. Yes sir.

139 Q. I will ask you if the use of one duct in your underground circuit was not made one of the conditions of the contract to which you refer?

A. I don't remember, But I am inclined to think it was.

140 Q. With regard to the repairs made upon the fire and police wires in the City of Memphis by the Cumberland Telephone & Telegraph Company; I will ask you if, in this work, you  
270 were not ably assisted by the City Electrician in fitting up the ringing circuit, fire alarm system and the police patrol system on all occasions where there had been breaks or interferences of the service on account of other casualties?

A. In answer to that I will state that Mr. Moran, the City Electrician, was usually always with us when the wires were down, and often times assisted us, but I can recall a number of cases where it was impossible for him to be on hand, and other cases where he was on hand and did none of the actual work. You can take when we had a sleep storm here eight or nine years ago, the police wires, telephone wires, electric light wires, and in fact, wires of all descriptions all over the City of Memphis, were down in numerous places; we then took our entire construction department with the exception of a few men that we put out to cover the streets as fast as possible to cut the balance of the wires down so that they would not become crossed with the electric light wires and kill people, and

our gang went to work immediately putting up the fire and police alarm wires in preference to the wires of the Cumberland Telephone & Telegraph Company.

141 Q. At that time, is it not a fact, that your wires had come in contact with the street car wires, and the exchange of the Cumberland Telephone & Telegraph Company had been burned down?

A. At one time that was the fact, but I do not only speak of that time, but other times. We have had more sleet storms here than one, and it caused damage each and every time.

142 Q. Your maintenance gangs, and the people you have on your construction work then have always given preference to the City of Memphis in their repairs over their own work; is that what you mean to state?

271 A. I do not mean to state that; I mean in cases of this kind we gave the City of Memphis preference. Well you might say there were two reasons; one was that by getting the fire and police wires to work it would not only be assisting the City and the City Electrician, but it would be a great protection to the City and the Citizens.

143 Q. And to the properties of the Cumberland Telephone & Telegraph Company as well?

A. Certainly.

144 Q. These instances to which you refer were matters of great emergency to the public, and the public good suggested to you that the public wires should be repaired first; is that correct?

A. Practically so, yes sir.

Redirect examination.

By General WRIGHT:

145 Q. You were asked as to the contents of the contract entered into between the defendant company and the City of Memphis in the year 1903 in settlement of a suit for pole rental; have you recently examined that contract?

A. I have not; no sir.

146 Q. Have you it before you now?

A. I have not, no sir.

147 Q. You say in answer to a question that you did not understand that the right to use the defendant company's poles for fire alarm, police alarm and the ringing circuit was, for the first time, given the city by that contract, as a part of the terms; explain more definitely what you meant by that answer; and in that connection state whether, prior to the time of the compromise mentioned that you had reference to, the poles of the defendant company had  
272 been used by the City for this police and fire alarm and ringing circuit systems?

A. My reason for saying that the compromise of that date did not cover the use of the Cumberland Telephone & Telegraph Company's poles for the fire alarm, police alarm and ringing circuit wires of the City of Memphis was from the fact that when I first came to Memphis these poles were being used by the City for carry-

ing the City's wires; and the City also had a number of telephones prior to this contract.

Recross-examination.

By Mr. McREE:

148 Q. Mr. Hume, with regard to the courtesies referred to by you as being extended by the Cumberland Telephone & Telegraph Company to the City Electrician, and to the City itself, with regard to its wires, I will ask you if they were not in a sense a return of courtesies shown the company on behalf of the City Electrician, who did everything in his power to protect the property of the Company, and if he saw dangerous wires he cut them to protect the company from damage, and used every means in his power to assist them in their business, and protection of their properties?

A. In answer to that particular question, I will say that wherever there is a man that has been friendly to the Company, the Cumberland Telephone & Telegraph Company wants to show its appreciation. It is the policy of the Cumberland Telephone & Telegraph Company to assist not only the city of Memphis, but other cities that I have lived in since being connected with the Company in cases of emergency.

149 Q. It is true then that Mr. Moran has repeatedly undertaken to protect not only your company, but other public service corporations that came under his observation and control by means of efforts on his part to protect their property, to save them from liability, and from damage suits and damages?

273 A. Yes sir, he has done that, and I would like to state in connection with it that I believe the wire using companies of Memphis have all done the same ever since we have been operating here.

150 Q. It is an exchange of courtesies as between parties using wires and poles, is it not?

A. You use the word "courtesy," but we do not look at it exactly in that light. We do it to save the public from personal damages or death more than for the courtesy of helping out another company. The Cumberland Telephone & Telegraph Company has issued instructions to its employees that if it should see a wire belonging to the Memphis Telephone Company, a competitor of the Cumberland Telephone & Telegraph Company, in a position where it would be crossed with a high tension wire, to clear the wire, if possible; and if not, to immediately notify the Memphis Telephone Company of the location of this wire, and the condition of same.

151 Q. It is then a policy pursued for the sake of humanity, and the protection of property, such as men of decency and kindness of heart would extend towards each other?

A. Yes sir.

Redirect examination.

By General WRIGHT:

152 Q. Mr. Hume, since the beginning of the suit of the City of Memphis against the Cumberland Telephone & Telegraph Company

for pole rental embraced in the above mentioned suit in the Chancery Court of Shelby County, Tennessee, has the City of Memphis given any permits to the defendant company to set up poles?

A. Yes sir they have.

274 153 Q. In how many instances?

A. I do not remember the number of permits that *they* have been issued.

154 Q. And poles have been set up under these permits?

A. They have; yes sir.

155 Q. Those poles and wires were an extension of the general system of the defendant company, were they?

A. Yes sir.

And further deponent saith not.

FOSTER HUME.

Sworn to and subscribed before me this 24th day of February, 1908.

[N. P. SEAL.]

A. W. KETCHAM,  
*Notary Public.*

275 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS et al.

*The Replication of the Plaintiff, The Cumberland Telephone & Telegraph Company, to the Answer of the City of Memphis and Others, Defendants.*

Filed March 2, 1908. Dan F. Elliotte, Clerk.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereto said that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this Honorable Court shall direct, and humbly prays as in its said bill *is* has already prayed.

WRIGHT & WRIGHT,  
*Solicitors for Complainant.*

276 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS et al.

*Agreement of Counsel as to Proof.*

Filed March 2nd, 1908. Dan E. Elliotte, Clerk.

In order to save the necessity of taking formal proof upon admitted facts and unnecessarily cumbering the record in the foregoing cases, it is stipulated by and between counsel representing the respective parties therein that the material parts of all permits, which are now in existence, or can be found in the City records, or in the defendant Company's files, which were, from time to time granted by the municipal authorities of the Taxing District of Shelby County, Tennessee or the City of Memphis for the erection of poles in connection with the telephone exchange of the defendant company, and its predecessors in title, are as hereinafter set forth.

It is further stipulated and agreed that what is known as the conduit, or underground ordinance of the city of Memphis, and subsequent proceedings thereunder, in so far as they effect the Cumberland Telephone & Telegraph Company, are as hereinafter set forth.

It is further agreed that the minutes of the Taxing District of Shelby County, relating to the petition of S. T. Carnes stating his purpose to establish a telephone exchange in the Taxing  
277 District of Shelby County, Tennessee, and asking that the City grant him the right to place poles and string wires in the streets and alleys of the taxing district, as testified to by said Carnes in his deposition on file in this case, and the grant of the prayer of the petition of said Carnes by the Legislative Council of the Taxing District, are as hereinafter set forth; and that the original petition of the said Carnes, referred to in said minutes, as hereinafter set forth, has been mislaid or lost and that diligent search has been made therefor by the Register of the City of Memphis in whose custody said paper properly should be, and that he is unable to find the same.

WRIGHT & WRIGHT,

*Sol'rs for Cumberland Telephone &  
Telegraph Company.*

O. K.

JAS. L. McREE,

*Sol. for City of Memphis.*

278 The following permits were granted to the Telephone Company by David P. Hadden, President of the Taxing District of the City of Memphis:

April 26, 1883—Permission to replace poles on Front street from the Gas Works to Union Street, one arm to be left for the use of the Fire Department;

June 7, 1883—Permission to set poles on the east side of Second street from Madison to Washington, to be located by the Taxing District Engineer, subject to the rules and fire alarm privileges on the top arm.

July 9, 1883—Permission to renew poles on the west side of Yates avenue to First Alley, position to be designated by City Engineer. All poles subject to Fire Department use, as Fire Chief may direct;

July 13, 1883—Permission to renew and replace all poles in first alley from Madison to Union street, subject to former conditions;

July 19, 1883—Permission to reset new poles on Union street to Main and down Main to Beale, at such points as the City Engineer may designate, subject to the Fire department regulation and uses; also conditioned upon electric light company being permitted to use the poles if desired.

July 29, 1883—Permission to reset poles on Vance street from Main to first alley east of Hernando; thence along said alley to Pontotoc street; thence east on Pontotoc street to Wellington;  
279 thence north to Linden street; thence east to Lauderdale; thence south to the alley north of Vance street; thence along said alley to Orleans street; thence south on Orleans. The usual restrictions as to fire alarm, &c., is reserved.

Aug. 2, 1883—Permission to renew poles on Madison street from Main to Wellington, subject to all former rules and regulations;

Aug. 6, 1883—Permission to reset poles from Beale street south to Main street, under the usual regulations.

Aug. 14, 1883—Permission to rebuild line in first alley from Madison street south to Gas Works, subject to all the rules and regulations of the Taxing District requirements.

The following is in substance a copy of the minutes of the Legislative Council of the Taxing District and of the City of Memphis relative various petitions, etc. from the Cumberland Telephone & Telegraph Company:

First. A communication was read from S. T. Carnes on organizing a telephone exchange and asking the District to connect their lines and to allow one to the Fire Department.

On motion it was referred to a Committee of three. The Chair appointed Messrs. Overton, Goyer and Gunn.

Book A, page 95—December, 15th, 1879.

280 Second. The committee of petition of S. T. Carnes recommended that it be granted, provided no post be put up except by permit to the President and Engineer, and that the granting of same does not create a monopoly. On motion the report was received and adopted.

Book A, page 96—December 18th, 1879.

Third. A communication from S. T. Carnes, Manager of the Telephone Company, asking that the Engineer be instructed to show him the places to plant his poles was referred to the Engineer to do so.

Book A, page 115—February 13th, 1880.

On motion Capt. Carnes was allowed to erect Telephone poles in Center alley as per plans submitted, subject to the approval of City Engineer.

Book A, page 167, Sept. 27, 1880.

The petition of Telephone Co. for pay for use of Telephones used by the District at the regular rates instead of  $\frac{1}{2}$  rates as now paid was referred to Messrs. Brown, Galloway & Gun for report.

Book A, page 211—July 7, 1881.

The Com't- on petition of Mphs. Telephone Exchange reported as follows: which was adopted. "Your committee on petition of S. T. Carnes, Manager, for full payment for use of the District Telephones on account of the Tax being levied which was not contemplated when this half rate was given would report in

281 favor of granting the petition."

Book A, page 221—October 1st, 1881.

The following resolution of Mr. Graves was adopted, Resolved that in the future no Railroad, Telegraph, Telephone or Electric Light Co. shall obtain permits to be permitted to erect any pole or poles within the limits of the District unless they erect a cross arm on top of said poles for and give permission to the District to use the said pole or poles for its Fire Alarm Telegraph wires; and the District hereby claims to have and now reserves in the future, the said privilege on all permits granted whether so specified or not."

Book A, Page 323—February 8th, 1883.

The petition of the Telephone Co. for permission to reset and renew certain lines of telephone poles was referred to the President with power to act.

Book A, page 341—May 3rd, 1883.

The petition of this Telephone Co. for permission to erect poles was referred to the President with power to act.

Book A, page 374—December 10th, 1883.

The committee to whom was referred the matter of wires being an obstruction to the Free use of Fire Ladders submitted the following report which was adopted:

Your committee to whom was referred the petition of the Chief of the Fire Department have to report that they had before them Mr. Cooks, Superintendent, of the Telephone Company who repre-



sents having had a correspondence with Mr. Babcock, President of his Company who replies and indicates that their company is ready to comply with any requirement the Chief of the Fire Department requires as to the placing of the wires of their Company so as not to offer any obstruction to the Fire Department. The Committee would recommend the Telephone Company be required to cable their wires in cables containing 100 wires each, and thus in two or three cables elevated to the top of the poles and out of the reach of fire ladders, during the will and pleasure of this Council or its successors.

H. A. MONTGOMERY.  
R. F. PATTERSON.  
T. J. GRAHAM.

Book A, page 401—June 5, 1884.

The following resolutions were adopted:

By Mr. Hirsch, Resolved that the Electric Light Co.'s report by the next meeting whether they have finished making the return circuits heretofore agreed upon and that this Telephone Co. & Citizens report whether the induction has been stopped.

Book A, page 621—April 23rd, 1888.

The Cumberland Telephone Co. petitioning for relief and stated that the induction complained of had not been stopped and that the Electric Light Co. had not put in the return circuits as promised. On, motion it was received and filed and a copy ordered sent to the Electric Light Co.

Book A, page 623—May 3rd, 1888.

283 The following resolution by Mr. Graham was adopted.

Whereas, complainant is from time to time being made to this Legislative Council as to the danger resulting from the proximity of the wires of the Electric Light Co. and the Cumberland Telephone Co. and their frequent contact with each other endangering life; Resolved that the respective companies be required to place their wires upon separate poles — days and so located as to prevent any contact or induction.

Book A, page 625—May 3rd, 1888.

Petition of Cumberland Tele- Co. for permission to swing a cable on the east side of Second st. was received and filed.

Book A, page 631—June 7, 1888.

The petition of the Telephone Co. for permission to erect 4 poles on Monroe, 1 corner Main and Beale, 1 on South Court, 1 corner Adams and 3rd, 2 corner Winchester and Main, 1 corner Jefferson and Front 2 in 2nd alley rear of Willers and 2 on De Soto near Union was granted during the will and pleasure of the Council.

Book A, Page 635—June 14, 1888.

The petition of Telephone Co. for permission to run new lines of their pole routes whenever they have orders for Telephone orders,

was referred to President and Chief of Fire Department with power to act.

Book B, page 5—June 29, 1888.

284      Petition from Cumberland Telephone and Telegraph Company asking permission to substitute 60 feet poles instead of those now in use when their lines cross the City & Suburban R. W. Co.'s trolley wires on motion of Mr. Graham was granted.

Book B, page 284—September 25, 1890.

Petition from the Cumberland Telephone & Telegraph Co. asking to change their fleet of wires now running out Elliott Street from Main to Mississippi Avenue and Lauderdale to the north side of Clay Street and south side of Fraser Street from Main to Lauderdale on motion of Mr. Hirsch was granted the work to be done under the supervision of the City Engineer.

Book B, page 285—Sept. 25, 1890.

Petition from the Cumberland Telephone & Telegraph Co. asking to place 2 sixty-three foot poles in the North corner of Main Street and Beale and at the alley on west side of private alley just north of Beale street on motion of Mr. Pettit was granted.

Book B, page 319—December 11, 1890.

Petition from Cumberland Tel. & Tel. Co. that they be permitted to replace the Tel. pole in front of S. C. Toof & Co. on Second St. with a new pole, neatly dressed and painted but not of the regulation height only 50 feet was granted on condition that they erect said pole under the Supervision of the Chief of the Fire Department and for the joint use of other companies desiring to use it.

(Issue 414192.)

Book B, page 561—April 2, 1892.

285      Petition from Cumberland Tel. & Tel. Co. to be permitted to erect a pole Route down centre alley; another on Jackson St., and Johnson Ave.; Another down Poplar St.—the poles not to be of regular height—upon motion of Geo. H. Hebers duly seconded that petition and the Resolution governing the erections of Tel. & Tel. poles were referred to the Fire and Police Commissioner to investigate as to the Pole Routes and the location of poles and recommendatory ordinance governing the erections of Tel. & Tel. Poles in the City.

Book B, page 561—April 2nd, 1892.

Petition from Cumberland Tel. & Tel Co. to be permitted to erect (3) three poles on east side of Second St. between Washington and Poplar; one new pole on the northeast corner of Poplar and Second and to replace one pole of Second St. at the southeast corner of the alley intersecting Second St. halfway between Madison and Monroe—upon Motion of E. J. Carrington duly seconded and carried the peti-

tion was referred to the Fire and Police Commissioners with power to act.

Book B, page 610—July 7, 1892.

Petition of the Cumberland Telephone & Telegraph Company asking permission to set a number of poles in different parts of the City on which to string their wires was read and on motion of Mr. Fowlkes referred to Fire Chief Burke with instructions to allow such poles to be set as will not cause undue obstruction to the highways.

Book C, page 517—January 28, 1895.

286 Petition from Cumberland Tel. & Tel. Co. asking permission to set a number of poles in various parts of the City was read and on motion of Mr. Hayden referred to the Chief of the Fire Department to investigate and see if the poles were really needed at the present time and report back to the council.

The petition from the Cumberland Telephone & Telegraph Company asking to be allowed to erect a line of 50 foot poles in third alley from Jackson to Madison St. for the purpose of bringing into the City long distance lines was read and on motion of Mayor Clapp referred to the Fire Department for investigation and report. Chief Burke to whom at a former meeting had been referred a petition of the Cumberland Telephone & Telegraph Co. asking permission to erect poles in various places reported verball- that he saw no objection to them so far as the Fire Department was concerned, on motion of Mayor Clapp the report was received and the former petition of the Telephone Company granted, subject to the will and pleasure of the Council.

Book C, page 543—April 4th, 1895.

Petition from the Cumberland Telephone & Telegraph Company to be allowed to erect two poles in the alley known as Whiskey Chute and one in Court Square to enable them to get into the new Continental Bank Building with their wires, was read and on motion of Mr. Herbers referred to a Committee composed of Messrs. Clapp, Fowlkes & Carrington who are to examine the route in question and who are given power to act upon the petition. The petition of the Cumberland Telephone & Telegraph Company for occupancy of

287 Third Alley from Jackson to Madison street with a line of 50 ft. poles which was read at meeting at 4th inst. was discussed at some length but no action taken thereon.

Book C, pages 557-8—April 22nd, 1895.

A petition from the Cumberland Tel. & Tel. Co. asking permission to replace eight poles on Johnson Avenue at crossing on the L. & N. R. R. being on each side of the railroad, and eight poles at Judge Du Bose's place on the same avenue between Manassas Street and Peyton Avenue with new and better poles, the work to be done under the supervision of the Chief of the — Department was read and on motion of Mr. Carrington referred to the Chief of the Fire Department with power to act. Mr. E. L. Powell, Manager of the Cumber-

land Telephone & Telegraph Company asked what action the Council had taken in regard to his Company's petition which was read at meeting April 4th, asking to be allowed to erect 50 ft. poles in Third Alley from Jackson to Madison St. Fire Chief Burke, to whom at the time the matter had been referred, reported verbally that he did not think the council should grant the petition as to Third Alley, but saw no objection to the poles being placed in Fourth Alley whereupon Mr. Walsh made a motion which was carried that the petition of the Cumberland Telephone & Telegraph Company was read at meeting April 4th, 1895, be rejectee as to the use of Third alley, but permission is given them to set the 50 ft. poles in Fourth Alley, alley from Jackson to Madison St., the work to be done under the supervision and to the satisfaction of the Chief of the Fire Department.

Book C, page 577—June 6th, 1895.

288 A petition from the Cumberland Telephone & Telegraph Co. asking permission to replace with 50 foot poles the 5 poles on Monroe St. between Center alley and the alley between Second and Third Streets, on south side of the street and set in *write* with two new poles was read and on motion of Mr. Fowlkes referred to the Mayor and Chief of the Fire Department with power to act.

Book D, page 51—November, 1895.

A petition from the Cumberland Telephone & Telegraph Co. asking that it be allowed to replace with 50 foot poles the two old poles in Center Alley between Monroe Street and the alley running east and west between Monroe and Madison Streets on the west side of Center alley, was read and on motion of Mr. Fowlkes referred to the Chief of the Fire Department with power to act in conjunction with the Mayor.

Book D, page 60—November 20th, 1895.

Mr. E. L. Powell, Manager of the Cumberland Telephone & Telegraph Company appeared before the Council and stated that at meeting November 5th, 1895, he had presented a petition to the Council to be allowed to set five poles on Monroe Street between Center Alley and the alley between Second and Third Streets and that the petition had been referred to the Mayor and the Fire Chief with power to act but that they had failed to agree as to the location of the pole on the side of Loeb's Laundry and wished to have the matter referred back to the Council. He further stated that the building has a cellar and a subcellar and if the pole is placed in the pavement inside the curb

line that it would interfere with the cellar and asked permission to place the pole in the curb line which necessitates the cutting of about six inches out of the curbing. On motion of Mr. Hayden the Telephone Company was granted permission to erect the pole on the curb line as requested, provided, the consent of Mr. Loeb and the property owned was first obtained and the work done under the supervision and to the satisfaction of the City Engineer and Chief of the Fire Department.

Book D, page 70—December 5th, 1895.

A petition from the Cumberland Tel. & Tel. Co. asking permission to set two poles in Alabama Street south of Thornton Avenue was read — on motion referred to the Chief of the Fire Department.

Book D. page 70—December 5th, 1895.

A petition from the Cumberland Tel. & Tel Co. asking permission to set two poles in Alabama street, south of Thornton Avenue was read and on motion, referred to the Chief of the Fire Department with power to act.

A petition from the Cumberland Telephone & Telegraph Company asking permission to replace with new ones the two poles in Fourth Avenue north of Monroe St. and to set two poles in said alley between the alley running east and west between Madison and Court Streets and the Alley running east and west between Madison and Monroe streets, it agreeing to remove in all, five poles which it now has in said alley between Monroe and Court streets was read and on motion of Mayor Clapp referred to the Chief of the Fire Department for investigation and report back to the Council.

Book D, page 112—January 30th, 1896.

A petition from the Cumberland telephone & Telegraph Company asking permission to rebuild certain poles routes named in said petition, to erect a line of poles on south side of Madison Street, from Orleans to Dunlap and to change the location of certain poles was read and — motion of Mr. Fowlkes, referred to the Chief of the Fire Department and the City Engineer for investigation and report back to the Council.

Book- D, page 123,—February 24th 1896.

A petition for permission to rebuild on South Main Street from Webster to Iowa; three poles on Main street west to the Cotton Compress on Carolina street; replacing seven poles on Front Street, south of Mill; rebuilding Front street from Mill to Keel on the north side of Keel, east to Second street; thence, on Second street to the corporation limits; from Poplar street on High to the Winchester Cemetery; out north Winchester street to the L. & N. R. R. on Mosby street from High to Jones Avenue; on Beale street from Myrtle to Pid-con Roost Row; thence south to Walnut, changing from the north to the south side of the street; also from the corner Mill and Front Streets, east on Mill street to the corner of Mill and Sixth; north to Sixth street to the corporation line; on Bradford street from High to Jones Avenue; also to change one pole at the Corner of Alabama and Quinby Streets; to erect line and poles on Madison street from Orleans to Dunlap, poles to be placed 120 feet apart. Poles to be set under the supervision of the Fire Department on lines given by the City Engineer; also permission to rebuild pole route in Pontotoc alley from Lauderdale street to a point between Orleans and McKinley streets, subject to the supervision of the chief of the Fire Department.

Book D, Page- 142-3 March 9th, 1896.

A petition for permission to replace poles on Jackson street from Robeson West to Main, and to erect poles on the south side of

Calhoun street from Tennessee street to a point between Main and Shelby Street-; all work to be done under the supervision and to the satisfaction of the Chief of the Fire Department.

Book D, page 245—July 21st, 1896.

A petition for permission to erect guy pole on Poplar; also to replace five poles with new ones as follows: One on Front street between Union and Monroe, one on Mississippi avenue south of Frazier street, one on Monroe just west of the Iron Bridge, and two near the corner of Orleans and Jefferson streets; also a line of poles on Poplar street from High to Orleans.

Book — 319-20 October 8th, 1896.

A petition from the Cumberland Telephone & Telegraph Co. asking permission to erect new poles and replace old ones on certain streets named in said petition was read, and on motion of Mr. Haszinger granted, the work to be done under the Supervision of the Chief of the Fire Department.

Book d, page 343—December 10, 1896.

292 A petition from the Cumberland Telephone & Telegraph Co. asking permission to erect certain lines of poles and to rebuild other the location of which are specifically set forth in said petition, was read and on motion of Mr. Walsh referred to the Chief of the Fire Department with instructions to investigate the matter and to report back to the Council at its next meeting as to the necessity for the erection of the poles asked for.

Book D, page 377, February 4th 1897.

A petition for permission to set poles on Vance street from De Soto to Wellington; also permission to rebuilt lines from the Howard Row to Georgia street, on Clinton street, thence west to Kansas Avenue, thence south to Iowa avenue; also a reconstruction of the line on St. Paul street; also replace old pole on the corner of Main and Calhoun and at the Charleston Railroad Bridge and Madison street.

Book D, page 385—February 16th, 1897.

A petition for permission to erect a new pole on the corner of Madison and Front and also to reconstruct poles on Madison street, work to be done under the Supervision of the Chief of the Fire Department.

Book D, page 408—April 8th, 1897.

Petition to erect poles, wires etc., on west side of Walnut St., to Polk Street; thence along north side of Polk street to McKinley street, taking the south side of McKinley street to Polk street to Orleans avenue; thence along the west side of Orleans Avenue to an alley just south of K. C. Ft. S. & M. R. R. and granted at will and pleasure of Council.

Book —, page 97 December 19th, 1898.

293      Petition from Cumberland Telephone & Telegraph Company to erect a line of poles on south side of Madison street from Dunlap street to Stratton Avenue was granted.  
Book E, page 415—July 28th, 1900.

Petition of Cumberland Telephone & Telegraph Company to erect line of poles begin-ing with De Soto and Madison streets going south on East side of De Soto to Union; thence on west side of De Soto to Georgia; thence east on south side of Georgia to Davie; thence south on west side of Davie to Walker; thence east on north side of Walker to Lauderdale street; thence south on west side of Lauderdale to McLemore; thenfe on east side of Lauderdale to City limits, was granted during will and pleasure of Council.

Book E, page 421—August 9, 1900.

Petition from Cumberland Telephone & Telegraph Company to erect lines of poles on south side of Linden street from De Soto to Walnut was granted subject to will and pleasure of Council.

Book E, page- 491-2, April 4, 1901.

Petition of May 9th, 1901 of Cumberland Telephone & Telegraph Company to erect a pole route on north side Adams street from first alley east of Third street to Orleans Street granted during will and pleasure of Council.

Book E, page 541, July 30th, 1901.

294      Petition of Cumberland Telephone & Telegraph Company of November 7th, 1901 to erect and maintain a line of poles on north side of Overton street from East street to Raleigh avenue and also on west side of Seventh street from Will street to New Raleigh Road was granted subject to will and pleasure of council.

Book E, page 595, December 5th, 1901..

Petition of January 16th, 1902 of the Cumberland Telephone & Telegraph Company to erect poles along Bayou Gayoso at points marked was granted.

Book F, page 50—June 5th, 1901.

Petition of the Cumberland Telephone & Telegraph Company to erect and maintain line of poles in first alley north of Alabama from Hill to High street, three (3) Poles on Forest avenue between Evergreen and Maxwell; five (5) poles on west side of Raynor street north of Southern R. R. was granted during the will and pleasure of the Council.

Book F, page 171--April 20th, 1903.

Petition of Cumberland Telephone & Telegraph Company of May 9th, 1903, to erect a line of poles on east side of Peyton avenue from Johnson avenue to Saffarons street and four (4) poles on south side of Gholson street between Kentucky avenue and Pennsylvania avenue was granted during the will and pleasure of Council.

Book F, page 236, August 6th, 1903.



295      Petition of Cumberland Telephone & Telegraph Company of August 13, 1903 to erect poles on East side of Millett street to Central Avenue and north side of Henry street from Second to Randolph Road and on west side of Robeson street between Grove and Polk was granted during the will and pleasure of Council.

Book F, page 246—September 10th, 1903.

Petition of Cumberland Telephone & Telegraph Company to erect and maintain a line of poles on Idlewild Court from Madison to Poplar street also a route on Seventh and Fourth street- from Kerr avenue to New Raleigh Road was granted subject to will and pleasure of Council.

Book F, Page 255—October 8th, 1903.

The following permits were granted by various authorities to the Cumberland Telephone & Telegraph Company to erect poles in several places in the City of Memphis:

A petition for permission to reset pole line on Manassas from Poplar North to Robeson, said permit being granted by James Burke, Chief of the Fire Department.

October, 19, 1897.

Permission to erect and maintain poles beginning with DeSoto and Madison streets, going south on DeSoto to Union, thence to Georgia street, thence on Georgia street to Davie avenue, south on Davie avenue to Walker, east on Walker to Lauderdale, south on Lauderdale to McLemore avenue; thence on McLemore avenue to city limits. Granted, "during the will and pleasure of the council upon condition

296      that the company to run a pair of wires from the De Soto street engine house to the Mississippi avenue engine house; also one pair of wires from the corner of St. Paul and Lauderdale streets to the Mississippi Avenue engine house, the wires to be the same as used by the fire department at present."

August 9, 1900.

Permission to erect poles on the north side of Vance from DeSoto to East street; also on the north side of Union street from DeSoto to Dunlap. Granted subject to the will and pleasure of the City Council.

The various permits granted to the Cumberland Telephone & Telegraph Company by the Board of Fire and Police Commissioners.

Petitions of the Memphis Street Railway Company and the Cumberland Telephone & Telegraph Company and Memphis Telephone Company asking permission to reset poles on certain streets and alleys and to establish line of poles on others was read and referred to the City Electrician.

Book B, Page 63—July 10, 1906.

Petition by Cumberland Telephone & Telegraph Company to run its wires in conduits around the square of the site of New Court House instead of in the alleys, in order that evacuation be made for said Court-house was granted.

Book B, page 108—January 2, 1907.

- 297      Petition by Cumberland Telephone & Telegraph Company to maintain telephone condition from Union Avenue to Madison avenue on McNeil street on account of new exchange was granted.  
Book B, page 32—January 27, 1906.

Dr. Thompson appeared before board and pointed out that number of people were in eminent danger because of inability to secure services of the Cumberland Telephone & Telegraph Company and asked that former resolution refusing said Company any permits to erect new poles be rescinded. On motion of Mr. Bruce said right was modified to the extent that the Mayor could grant them if he saw fit to do so or refuse if in his judgment he thought best.

Book B, Page 153—November 26, 1907.

Petition of Cumberland Telephone & Telegraph Company to erect four poles on north side of Adams Avenue west of Watkins street was granted, work to be done under supervision of City Electrician.

Book B, page 155—December 10, 1907.

Petition of Cumberland Telephone & Telegraph Company to erect poles as follows was granted.

Three poles on Grace street; three poles on south side of Wicks Avenue, south of LaRose street; one poles on east side of Patton street between Gaston and Walker and two poles on south side of Gaston Avenue between Patton and Preston streets, three poles on north side of Durant street between Preston and Vance streets; four poles on south side of Cowden Avenue east of McLean Street; three poles on West side of North Claybrook Street.

298      Book B, Page 159—January 7, 1908.

Petition of Cumberland Telephone & Telegraph Company as follows was granted:

To erect 8 poles on east side of Rozelle street between Lamar Avenue and Southern R. R. and also ten poles on East side of Ryle Street between Southern R. R. and speedway.

Book B, page 161—January 14, 1908.

The following petitions of the Cumberland Telephone and Telegraph Company were acted upon by the Upper Board of the Legislative Council of the City of Memphis.

A number of petitions of same nature (to erect poles) of Cumberland Telephone & Telegraph Company and were granted and referred to City Electrician with power to act, the work to be done under his supervision.

Book A, page 83—February 8, 1906.

Petition of Cumberland Telephone & Telegraph Company to rebuild certain lines as follows:—

From City limits to Keel Street on Second Street; on west side of Second Street from Keel to Auction; on Auction from Main to Front; on Third from Overton to Jackson; on Jackson from Front street, corner of Jackson and Commerce.

To set four poles in Fourth Alley to shorten present space between Jackson and Court streets. This work is made necessary on account of our present lines being ordered taken by *by* Park Commission on account of Confederate Park.

Upon motion of Dr. Henning petition referred to Mr. 299 Moran with power to act.

Book A, page 139—April 7, 1906.

Petition of Cumberland Telephone & Telegraph Company to erect certain poles was read, to wit:

Five poles on east side of McDavid Avenue,

Three poles on south side of Overton Street,

4 poles on north side of Van Buren Avenue.

The following underground ordinance was passed:

"SECTION 1. Be it ordained by the Legislative Council of the City of Memphis, That, except as herein after provided, every person, firm, corporation or organization having obtained or that may hereafter obtain, a grant or permission to operate within the City of Memphis any telegraph, telephone, electric light or power service, requiring the distribution of electrical energy by means of wires along or across the public thoroughfares of the City, are hereby prohibited, from and after the passage of this ordinance, from constructing such wire lines or any of their poles or appurtenances above the ground in passing along or across such public thoroughfares within the limits to be known as the Conduit District, bounded as Follows: On the north side by the first alley north of Exchange street; on the south by a line one hundred and forty-eight and one-half feet (148- $\frac{1}{2}$ ) feet south of the south line of Vance Street; on the East by the first alley east of Third street, from Exchange street south to Union street; thence east on Union street to Hernando street; thence along the east line of Hernando street to a point one hundred and forty eight and one half (148- $\frac{1}{2}$ ) feet south 300 of the south line of Vance street; and on the West by a line commencing at Exchange street twenty (20) feet west of the west line of Front street; thence south to Howard Row; thence west to Howard row to Clinton Street; thence south with the west side of Clinton street to a point one hundred and forty-eight and one-half (148- $\frac{1}{2}$ ) feet south of the south line of Vance Street. Said conduit district shall include said streets.

Provided. That the following overhead wires with their appurtenances are excepted from the requirements of this ordinance

a. All wires and poles used for street railway operation.

b. All wires and lamp poles, with such appurtenances as may be deemed desirable by the Legislative Council of the City of Memphis, used for the purpose of public street lighting.

c. Such wires, poles and other appurtenances as may be deemed unobjectionable by the Legislative Council of the City of Memphis, within the limits of any block used for the purpose of sub-distribution of wires with that block; but in no event shall such wires be permitted to cross any street or alley overhead, within such conduit district.

SEC. 2. Be it further ordained, That any person, firm or corporation owning any telegraph, telephone, electric power of the electric service lines, with the exceptions aforesaid passing along or across any public thoroughfares with the territory described above ground, shall remove all of their poles wires, guy-wires, and all other appurtenances within six months after the passage of this ordinance. All the expenses connectee with the removal of such poles, wires and other appurtenances and the making good of any damage done to any public or private property in so doing, shall be borne by the parties owning such poles, wires and appurtenances. When  
301 poles are removed from public streets, thoroughfares or alleys, the hole shall be filled up and the sidewalks and pavements placed in good condition similar to the surrounding sidewalk or pavement, and in a manner satisfactory to the city engineer.

SEC. 3. Be it further ordained, That in the Public thoroughfares, streets, alleys and squares with the territory hereinabove described, after six months from the passage of this ordinance, all electric service wire lines, with the exceptions hereinabove mentioned, shall be placed in conduits underground, under the following restrictions and relations:

The city shall control all manholes into which the conduits run.

Before any person, firm or corporation shall proceed to construct, alter or repair any such underground conduit into which to run any electric service wire line, said person, firm or corporation shall make application to the Legislative Council for a permit to perform such work, Such application shall state the name of the applicant, the purpose for which the use of the conduit or conduits is desired, the materials of which it is proposed to construct them together with the plan and specifications showing the proposed method of construction. All such applications shall be accompanied with detail plans showing the desired route of conduits, grouping of ducts and distribution of boxes.

Applications shall also state the arrangement, section and general disposition of electrical conductors which it is proposed to place in the conduits for which application is made to construct.

When such applications, together with the data mentioned, have been filed with the City Engineer, it shall be his duty to  
302 see that proposee conduits in their route, disposition, material and construction conform with the general rules and requirements governing same, adopted by the City of Memphis.

The City Engineer shall also decide as to proper depths, gradients, ventilation, and drainage proposed to be given to the conduits, such data receiving also the endorsement of all city officers, who- duties require the- to supervise any underground construction whatever, so that no undue interference with the other underground construction may result from the building of the conduits.

Conduits shall be provided with ducts 50 per cent in excess of those required to carry the wires in use along the routes of the proposed conduits at the time of making application for a permit to construct the same.

After approval of the proposition on which a permit is desired

and amended if necessary, the party or parties submitting the same shall file with the Mayor a penal bond in the sum of ten thousand dollars, with two or more good and sufficient sureties, approved by the Mayor, conditioned that the conduit construction shall be carried out in accordance with the terms of this ordinance, or with the rules and regulations governing conduit construction and use, approved by the Legislative Council; that the City of Memphis shall be held harmless from all suits for damages that may arise from the construction of any conduit, or that may arise from operating therein, or that may arise in any way as a result of said construction or operation. Whereupon a permit shall be issued for the construction of the conduits.

Before any electrical service wires are placed in any conduit so constructed, a permit will be required. Applications for  
303 this permit shall be made by the person, company, corporation or organization owning the conduit. All such applications shall state:

The name of applicant.

The purposes for which the use of the conduit or conduits is desired.

The number material and dimensions of conductors proposed to be placed therein.

The arrangement of said conductors, whether singly or in cables, and if in cables, the number of conductors and their disposition in each cable.

The maximum electro-motive to be used on said conductors.

The nature of the insulating material or materials to be employed, and such other specific information as will fully explain the use to be made of the conduit.

On approval of the Legislative Council, or its duly authorized officer, a permit shall be issued for the performance of this work, conditioned on conformation to the rules and regulations governing the occupation of electrical conduits, approved by the Legislative Council, and placed on public file.

All repairs, alteration or work of any kind required on the conduits, the electrical conductors or their appurtenances, shall be subject at all times to the rules and regulations concerning such work approved by the Legislative Council and placed on public file.

When it becomes necessary to depart from any plans approved by the Legislative Council because of obstructions, it will be the duty of any party carrying on work or in any electrical conduit to immediately report the difficulty to the City Engineer, and at the same time submit an alternative plan of construction calculated

304 to overcome the difficulty. No departure from standard construction primarily approved by the council shall be allowed until such modification *have* has the approval in writing of the City Engineer.

Plans showing all details of conduit construction and the disposition of all electrical conductors and apparatus within or connected with the conduits shall be filed with the City Engineer promptly on the execution of any work, so that a complete record of all conduits,

with their appurtenances and overground connections, together with the electrical conductors and apparatus installed in connection therewith, shall at all times be on file with the said City Engineer.

SEC. 4. Be it further ordained, That in the construction, alteration or repairs, of any conduit or its appurtenances, no excavation shall be made on any one continuous line for a greater length than four block-, at the same time; nor shall any excavation be permitted to exist in any public thorough fare for a longer period than is absolutely necessary to properly and expeditiously perform the work for which a permit is granted. All excavations made in pursuance of the rights which may be granted under this ordinance shall at all time be provided with sufficient guards and lights to render the same secure in themselves, and free from becoming a source of danger to the public.

All excavation for trenches or manholes shall be backfilled and tamped, to the satisfaction of the City Engineer, and all repairs shall be done by the city, of materials similar to that surrounding the street of pavement, and the company or companies making such excavations shall pay to the city the cost of such repairs at the end of the month during which such repairing is done.

305 SEC. 5. Be it further ordained, That all surface improvements disturbed in connection with the construction, alteration, repairs or use of any conduit, sub-distribution pole, or their appurtenances, carried on under the terms of this ordinance, shall be repaired to the satisfaction of the City Engineer in conformity to the city specifications for paving sidewalks or other improvements at the expense of the person, company, corporation or organization possessing the permit or right required for carrying on such construction, alteration, repairs or use. Such party or parties shall, moreover, keep such repaired surface improvements in a condition satisfactory to the City engineer for a period of one year after they have been repaired.

Should such party or parties fail to promptly fulfill the requirements of this section of this ordinance, the city may proceed with any or all of such work and charge the cost of performing the same to said party or parties. This proviso shall not give immunity from any penalty to be attached to the violation of the requirements of the ordinance.

SEC. 6. Be it further ordained, That if any person, company, corporation, or organization shall disturb any conduit laid in accordance with the requirements of this ordinance or interfere with its legitimate use, such party or parties shall pay all costs or damages resulting from such disturbance or interference.

SEC. 7. Be it further ordained, That the Western Union Telegraph Company, the Postal Telegraph Company, the Cumberland Telephone and Telegraph Company, the Memphis Telephone Company, the Memphis Light & Power Company, and the American District Telegraph Company, shall construct all the man-  
306 holes required for putting the wires underground, provided in this ordinance and the cost of construction and maintain-



ing said manholes shall be borne and prorated among said companies in proportion to the number of ducts entering said manholes.

All of said manholes shall be constructed of such size and character as will enable them to accommodate fifty per cent more ducts than all the companies entering the- will at first require. Said Manholes shall be constructed in accordance with plans and specifications approved by the Legislative Council.

After said manholes have been constructed they shall be under the absolute control of the city, or some officer designated by the city, to be used and occupied by said companies for the purpose of connecting with their conduits and ducts. The companies using said manholes shall allow only careful and experienced men to enter said man holes; upon proper evidence submitted to the Mayor that such men are careful and experienced he shall issue to such employes permits enabling them to enter said manholes, said permits to be granted for periods not longer than six months at a time.

SEC. 8. Be it further ordained: That any company, other than those expressly named herein, desiring to enter and use said manholes, shall be permitted to enter the same and use the same by first getting a permit from the city, and by paying its proper pro rata of the cost of construction and maintenance of said manholes, such pro rata to be determined by the Legislative Council.

SEC. 9. Be it further ordained, That no person, company corporation or organization owning, occupying or having rights in conduits under this ordinance shall sell, lease or sub-lease any property or privilege in connection therewith, without first obtaining the  
307 consent of the Legislative Council, nor shall any of said companies consolidate with any other company or companies without the consent of the Legislative council; nor shall any conduit or duct be used otherwise then for specific public services authorized by the council.

It is now expressly ordained and provided that no person, firm or corporation, shall by reason of the compliance with this ordinance, acquire any rights or privileges other and further than herein specifically expressed, and nothing herein contained shall be construed as extending or changing the terms length of time or any of the conditions of any contract or agreement now existing between the City of Memphis and any such person, firm or corporation; and the occupation and operation of said conduits and manholes shall be upon the same terms, length of time and conditions as now fixed by law or contract for the maintenance and use of overhead poles and wires.

SEC. 10. Be it further ordained, That the companies constructing and maintaining said manholes shall file with the City Engineer itemized, full and complete statements of the cost of constructing and maintaining said manholes.

SEC. 11. Be it further ordained, That any person, firm or corporation who shall violate any of the requirements of this ordinance shall on conviction thereof in the police court of the City of Memphis be fined in any sum not less than twenty-five (\$25.00) Dollars,



nor more than fifty (\$50.00) Dollars and each day's violation shall be considered a separate and distinct offence.

Passed final reading June 20, 1900.

J. J. WILLIAMS, *Mayor*.

Attest:

W. B. ARMOUR, *Secretary*."

308 The following proceedings appear upon the minutes of the Legislative Council:

THURSDAY, *June 21st*, 1900.

"Mr. Hadden stated that he thought the Council had been hasty in passing the Conduit Ordinance, and would like for some member, who had voted for its final passage to move for re-consideration.

Judge J. M. Greer, representing the Western Union Telegraph Company, addressed the Council, and stated that said company had had no representative before the Council when the ordinance passed, and they would like to have same re-considered, in order to show that the ordinance would work a hardship upon it.

Mayor Williams stated that it was through no fault of the City, that Mr. Emmett Howard, Manager of the Western Union Telegraph Company as well as the representatives of all the other wire-using companies in the City, had been notified of the meeting of the committee on Street Lighting and Electric Wires.

Mr. Raine moved for re-consideration of the Conduit Ordinance and same lost by following vote:

Messrs. Hadden, Raine, Litty, Carrington and Moran,—Aye. and Messrs. Henderson, La Croix, Green, Clark, Brinkley and Williams, No. 5 ayes and 6 noes.

THURSDAY, *July 5th*, 1900.

"Mr. Carrington stated that at meeting June 20, 1900, that it was his intention to vote the final passage of the Conduit Ordinance, but in the excitement, supposed he voted against same; that he was in favor of the ordinance, and had intended to vote "aye."

309 SATURDAY, *July 28th*, 1900.

"Mayor Williams stated that under the Conduit Ordinance, passed June 20, 1900, the plans and specifications of the various companies required by said ordinance to go underground shall be submitted to the City Engineer for his inspection and report to Legislative Council, and that he had called the meeting for the purpose of hearing the report of the City Engineer.

The Secretary then read the report of City Engineer, which is as follows:

*Engineer's Report.*

To the Honorable Mayor and Legislative Council. City of Memphis.

Gentlemen: The Cumberland Telephone & Telegraph Company and Electric Light and Power Company have filed in the city en-

gineer's office their plans, showing location and route, design of man-holes, handholes, method of laying duct groups, etc., of the conduit system proposed to be constructed by said companies in this city, as per ordinance passed by your honorable body June 20, 1900.

A careful comparison of same with the reports and plans submitted to this city by Mr. Lundie develops that these companies have followed in general terms the plans outlined by that gentleman, departing from said plans only in detail the most important of which are as follows, viz:

Reduction in size of man-holes from 5 x 14 to 5 x 7 with a partition wall in manholes separating high from low tension wires? Circular manhole covers for Cumberland Telephone & Telegraph

Company instead of square ones.

310 The location of the conduit lines has been slightly modified.

The number of ducts in group are not in accord with the number shown on plans of Mr. Lundie; in some instances more, in others less than the number shown by him.

The method of grouping the ducts in trenches is also at variance with Mr. Lundie, he requiring that they should not exceed two ducts in width until they are six ducts high, additional ducts to be laid in tiers of six, beginning with the lowest."

The specifications presented conform in general terms to those outlined by Mr. Lundie.

The economy of underground space in our streets and alleys is a matter of concern to the City of Memphis. It is therefore evidence that the smallest amount of space adequate to efficient service should be allotted for manholes. The building of compartment manholes resolves itself into private or corporate ownership, for this and the additional reason that other companies desiring underground space, especially at the intersection of alley-, a minimum space commensurate with proper service should be allotted to them.

The slight change in the alignment of conduit system from that indicated by Mr. Lundie is a matter of detail, which will not impair the value of service to be rendered.

The number of ducts proposed to be laid along the various lines should be discretionary with the engineers of the above named companies, for the reason that the maximum and minimum service required in different localities is better known to them than to your engineer.

The companies should satisfy the City, however, that the plant to be constructed by them is 50 per cent. in excess of present requirements.

311 So far as the method of grouping the ducts in trenches is concerned, I cannot see that it makes any difference to the City whether they are laid in two or four ducts wide to a height of two, four or six, for the reason that it is not the ducts but the manholes that occupy the greater and more valuable space i. e. alley intersections.

I think that the engineer should be permitted to examine the manholes on lines of conduit either in St. Louis or Chicago, to the

end that he may so located said manholes that other companies desiring space along the alleys may not be excluded.

Yours respectfully,

A. T. BELL,  
*City Engineer.*

Mr. Henderson moved, seconded by Mr. La Croix, that the report be adopted.

Mayor Williams stated that before the Council acted on the report he desired that the following letter from the Cumberland Telephone & Telegraph Company be read to the Council and the Secretary thereupon read the same:

MEMPHIS, TENN., *July 27, 1900.*

Hon. J. J. Williams, Mayor, etc., Memphis, Tennessee.

MY DEAR SIR: We have submitted to your city engineer plans and specifications for the construction of the conduit system, as required by your ordinance passed June 20, 1900.

These plans differ from the report of Mr. Lundie in some respects, but, we believe, in no material respect, other than with respect to the size of the manholes. Our plans show manholes 7 by 5 feet, while Mr. Lundie's plans show 14 by 5 manholes. At the time he prepared his plans he contemplated two telephone companies going underground, and his idea was that both would use these manholes, 14 by 5; but since only one company has as yet filed plans, the conditions contemplated by Mr. Lundie cannot be complied with in that respect.

Our plans show ducts fifty per cent in excess of our present requirements, and are in that respect in conformity with the ordinance.

We are prepared, and hereby agree, to take care of the Postal Telegraph Company's and the Western Union Telegraph Company's wires in our ducts, provided they desire to use them. This will not necessitate the enlargement of our ducts and manholes; but we have ample space to take care of their wires if they desire to come in with us, and we hereby agree that they may do so upon paying proper compensation.

We have submitted and filed a bond in the sum of \$10,000.00 as required by the ordinance.

These plans and specifications are filed and submitted upon condition that the following language in Section 3 of the ordinance passed June 20, 1900, will be amended by taking out of it beginning with the words: "Before any electrical wires are placed in any conduit so constructed, etc.," ending with the paragraph, "on approval of the legislative council, or its duly authorized officer, a permit will be issued for the performance of this work, conditioned on conformation to the rules and regulations governing the occupation of the electrical conduits provided by the legislative council, and placed on the public files.

Our purpose in asking that this language be taken out of the ordinance is, that it requires us, after building the expensive structure, to rely upon future legislative councils for permission to use the same, and we have understood that this was not the intention of the ordinance or of the legislative council.

With respect to your request that we submit the terms upon which we will provide space for the city's wires in our ducts, we desire to submit the following: We hereby agree to furnish to the City of Memphis the exclusive use of one duct, covering the entire area, in which our plans show we will construct, and sufficient soace in all our manholes, for use of the city's wires *sm* free of charge to the city for such length of time as we may be the only telephone company having an underground system in the City of Memphis, provided the Legislative Council will restrict the conduit district for a period of five years from the date of the acceptance of our plans and specifications on the following streets and alleys: All of Hernando street, west side of Front street, and all of Shelby street, (excepting that part of Shelby lying between Union and McCall streets), and the alley immediately east of Third Street, and known as Third alley.

While we do not insist upon taking out that part of the district lying south of Vance street, yet we call attention to the fact that it requires our cables to leave the underground system in the middle of a block, which will in our opinion, create friction and we should be allowed to come out of the ground at Vance street. This however, is a matter we do not ask you to include in the terms of the agreement, but respectfully submit that the same should be taken out of the ordinance.

Respectfully submitted,

CUMBERLAND TEL. & TEL. CO.,  
By WILLIAM L. GRANDBERY,  
*General Attorney."*

314 Mr. W. A. Percy, representing the Memphis Telephone Company addressed the Council, and stated that Mr. Grandbery was in error in stating the onply plans submitted were the Cumberland Telephone & Telegraph Company's for *which* the conduit matter first came up the Memphis Telephone Company was required by the first of last November to file plans and specifications for the underground system, and how they expected to go underground, which was gone, their right to begin work was by the Council extended on March 15, 1900, for one year, and they anticipated being able to do so, and he desired to disabuse the Council of any impression that they did not expect to construct a telephone company in the time allowed by the council.

Mr. Moran submitted a resolution "that the specifications for construction of an underground conduit system of Cumberland Telephone & Telegraph Company, be adopted on the condition that at the end of 25 years all of said underground conduit system and all property rights therein shall revert and belong to the City of Memphis.

Mr. Hadden moved to amend, by making the time 50 years instead of 25 years. Mr. Moran accepted the amendment.

A vote being taken the resolution lost by following vote: Messrs. Hadden, Moran and Carrington,—“Aye” and Messrs. Henderson, La Croix, Green, Litty, Clerk, Brinkley and Williams, “No,” 3 ayes and 7 noes.

On motion of Mr. Henderson the letter of Mr. Granberry was made a part of the City Engineer's report, and spread upon the minutes.

A vote was taken on the adoption of report, and same carried by following vote: Messrs. Hadden, Henderson, Lacroix, Green, Clark, and Williams Aye," and Messrs. Litty, Moran and Carrington,—

"No", 6 ayes and 3 noes. Mr. Brinkley did not vote, having  
315 excused himself and left the room before the vote was taken.

Mr. Litty offered an amendment to section 12 of the Conduit Ordinance,—That any company building any manhole or conduit in the City of Memphis shall do so only under the express condition and understanding that the City of Memphis does not waive any of its rights to use said space at any time for the purpose of laying water mains, pipes or such other construction therein, as it may any time require in the prosecution of its business, and the said companies shall make such alterations as may be necessary in the opinion of the Legislative Council;" seconded by Mr. Moran, and lost by following vote:

Messrs. Litty, Moran and Carrington,—Aye; and Messrs. Hadden Henderson, La Croix, Green and Williams "No," 3 ayes and 6 noes.

The bond of Cumberland Telephone & Telegraph Company in the penal sum of \$10,000.00 with James E. Caldwell, V. E. Shawb and Wm. Littered as sureties—That the Conduit Ordinance as passed by Legislative Council June 20, 1900, shall be carried out in accordance with the terms of said ordinance "was read, and on motion of Mr. La Croix, seconded by Mr. Carrington, was unanimously approved."

THURSDAY, *July 16th*, 1905.

Meeting of the Legislative Council of the City of Memphis; Shelby County, Tennessee, Thursday, July 16th, 1903.

The Legislative Council of the City of Memphis met this day at 8:20 p. m. *present* to call of the Mayor.

Present: J. J. Williams, Mayor B. R. Henderson, Vice Mayor, E. C. Green, W. D. Moon, David Gensburger, E. B. Le Master,  
316 William La Croix, and A. B. Carruthers, Supervisors of Public Works.

The Mayor presided. All of the members of the Council except Messrs. Armstead and Grace were present, and the following proceedings were had:

Committee on street lighting and Electric Qires and Ordinances and Resolutions submitted the following joint report upon the compromise settlement of the suit between the City of Memphis and the Cumberland Telephone & Telegraph Company, signed by all the members of the Committee with the exception of Mr. Litty, Chairman of the Committee on Ordinance and resolutions:

To the Honorable Legislative Council of the City of Memphis.

GENTLEMEN: We, your committees on Street Lighting, Electric wires and Gas, and on Ordinances and resolutions, desire to report that we met in joint session at the City Hall this -vening for the purpose of considering the matter of the settlement of our dispute with the Cumberland Telephone & Telegraph company and desire to report that, after a full discussion, we have agreed upon the settlement of said dispute upon the basis of a contract by and between the City of Memphis and the Cumberland Telephone & Telegraph Com-

pany which we herewith submit and ask its adoption in lieu of all other settlements we have proposed.

Respectfully submitted.

WM. LA CROIX,  
W. D. MOON,  
E. B. LE MASTER,  
*Street Lighting E. W. & G. Comm.*  
A. B. CARRUTHERS,  
E. B. LE MASTER,  
*Ordinance and Resolution Comm.*

317 The contract referred to in the foregoing report was next read as follows:

Whereas: for the recovery of certain pole rental provided for under the ordinance of the City of Memphis passed February 25, 1902, a suit was instituted by the City of Memphis against the Cumberland Telephone & Telegraph Company on June 25th, 1902, in the Chancery Court of Shelby, Tennessee, which was removed to and is now pending in the United States Circuit Court.

And, Whereas, The said City of Memphis and the said Cumberland Telephone & Telegraph Company desire to settle and compromise said suit,—

It is now stipulated and agreed between the said parties that in consideration for the agreements and undertakings by the said Cumberland Telephone & Telegraph Company hereinafter set out, the said City of Memphis, after the payment of all Court costs by the said Telephone Company, hereby orders said suit to be dismissed. In compromising and dismissing said suit, however, the said City does not surrender any right that it may have to collect a pole rental from the Telephone company, except for the years 1902 to 1903. For any year or years after 1903 the right of the City to collect the pole rental from said company remains unchanged and unprejudiced by this agreement in compromise of the pending suit, and whatever rights, if any the said Telephone Company may have in defense of any suit brought for such rental are also unprejudiced by this agreement.

The several undertakings and agreements of the said Cumberland Telephone & Telegraph Company with the City of Memphis which are the considerations for the dismissal of said suit are as follows:

318 First. The said Telephone & Telegraph Company in the exercise of any rights it may have, shall not charge for its services as a telephone company, an amount which shall exceed an average per station One (1.00) dollar per week until the number of stations connected with the exchange of said company shall exceed seven thousand, in the limitation under charges fixed in this contract shall cease.

Second. The said telephone company shall furnish free for the use of the Police and Fire Alarm wires of the said city and on duct in its present underground system, and such additional system as it may construct from time to time, together with the necessary and proper soace in the various manholes for the use of the wires.



Said Telephone Company shall also furnish free, for the use of the Police and Fire alarm wires of the City, space upon all of its poles now, or hereafter erected, and shall erect up-rights and cross-arms of such reasonable dimensions and construction as the City may direct upon the top of its poles, for the placing of the said City wires; but the City's wires shall be so placed as not to interfere with the wires of said telephone company.

Third. The said Telephone Company shall erect and establish a ringing circuit, and furnish bells and generators for the same in all of the fire engine houses now used, or hereafter to be acquired and used by the City. Said Telephone Company shall also establish and erect a twelve drop switch-board for the Police station of said City, and extension lines for eight desk sets in the Police Station of said City.

Fourth. Said Telephone Company shall furnish telephones free of charge to the following city institutions and offices, viz: City Secretary's Office, Mayor's Office, Board of Health Two (2) Crematories, Engineer's office, two (2) City stables, Hospital, Board of Education, and the same service to Public school Buildings as now rendered.

Fifth. The performance of the things hereinabove specified shall be a continuing obligation upon said Telephone Company, its successors and assigns so long as it may exercise any rights that it may have to do a Telephone business in the City of Memphis.

In Witness Whereof, The said City of Memphis and the said Cumberland Telephone & Telegraph Company through their officers have hereunto signed their names and set their seals this the 16th day of July, 1903.

Upon motion of Mr. Henderson seconded by Mr. Green, the report of the joint committee was adopted, and the contract approved by the following vote:

Messrs. Henderson, Moon, Carruthers, La Croix, Green, Le Master, ayed: and Mess. Litty and Gensburger, Noed. 6 ayed and 2 noed.

The contract was then signed by all of the members of the Committee present except Mr. Litty.



320

(W.)

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS,

and

In Chancery Court, Shelby Co., Tenn.

No. 14743, R. D.

THE CITY OF MEMPHIS

vs.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

*Agreement of Counsel as to Certain Proof.*

Filed March 14th, 1908.

*Dan F. Elliott, Clerk.*

It is agreed between the undersigned solicitors, representing the parties complainant and defendant in the above entitled causes that, in order to save the necessity of taking proof as to admitted facts, and to prevent the unnecessary cumbering of the records in said causes.

First: That on February 11th, 1882, the Memphis Telephone & Electric Company was duly incorporated and organized under the general incorporation Act of 1875, entitled an Act to provide for the organization of Corporations" passed March 19th, 1875, and approved March 23rd, 1875; that said Charter was duly amended in pursuance of said act, and acts amendatory thereof, on the 30th day of April A. D. 1883; and that among other things, it was authorized and empower-, under its charter and charter  
321 amendment to build, equip and maintain telephone lines, and to establish telephone exchanges, district systems and telephone circuits, to receive and execute orders, and to make connections between the different circuits and to receive and transmit messages for hire over its wires in the Taxing District of Shelby County, Tennessee.

A true copy of said Original and amended charter is hereto attached and marked "Exhibit "A".

Second: That the said Cumberland Telephone & Telegraph Company is a corporation chartered and organized in due form under Chapter 56 of the General Statutes of the Commonwealth of Kentucky, and the acts amendatory thereof, for the purpose of erecting, maintaining and operating telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems; that it

was so incorporated on the 8th day of June, 1883, that various amendments were made to its said charter, in due form, in pursuance of the said General Statutes of the Commonwealth of Kentucky, and acts amendatory thereof; that a true — of said Charter and amendments thereto are herewith filed and marked "Exhibit B; that said exhibit B is the same as Exhibit "A" to Original Bill, to which — refer, that the said Cumberland Telephone & Telegraph Company, shortly after its incorporation, engaged in the business of constructing and operating telephone exchanges and long distance telephone lines in Kentucky, Tennessee, and various other States of the United States and among other telephone exchanges for many year- has been engaged in operating a telephone exchange in the Taxing District of Shelby County, Tennessee, and its successor the City of Memphis; and that the said Cumberland Telephone & Telegraph Company, before engaging in said business in the state of Tennessee, fully complied with the laws of said State in regard to foreign corporations, and was duly authorized, under the laws of said State, so to carry on its business.

Third: That a true copy of the Bill and Answer in the first of the above entitled causes which is hereto attached marked "Exhibit C" shall be considered as filed in the second of the above entitled causes; and the Bill and Answer in the second of the above entitled causes, a true copy of which is hereto attached marked Exhibit "D" shall be considered as filed in the first of the above entitled causes.

Fourth. It is understood and agreed, however, that each of the parties in the above entitled causes reserves the right to except to Exhibit C and D referred to in the next preceding paragraph, for irrelevancy and incompetency.

O. K.

JAS. L. McREE,

*Solicitor for City of Memphis.*

O. K.

WRIGHT & WRIGHT,

*Solicitors for Telephone Company.*

323

X.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS.

EXHIBIT "A" TO AGREEMENT OF COUNSEL.

Filed March 14, 1908. Dan F. Elliotte, Clerk.

STATE OF TENNESSEE:

Be it known, that S. T. Carnes, W. W. Thacher, W. C. Fowlkes, F. M. Nelson and W. B. P. Mattox being twenty one years of age

and upwards, are hereby constituted a body politic and corporate by the name and style of the "Memphis Telephone and Electric Company" for the purpose of manufacturing Electricity to be applied to the science of telegraphing, telephoning, electro-plating and motive power; also for manufacturing, purchasing, selling, renting and using electric appliances and apparatus in telegraphing, telephoning, electroplating or motive power with power and authority to manufacture, sell, rent and use steam engines or hand apparatus, wires, poles insulators, and all other appliances necessary or convenient for the application of steam or electricity to the purposes of telegraphing, telephoning, electro-plating or motive power also for the manufacturing, selling, renting or using telephones and  
 324 telephone apparatus; with power and authority to build, equip and maintain telephone lines, and to establish telephone exchanges and District systems and telephone circuits, to receive and execute orders, and to make connections between different circuits, and to receive and transmit messages for hire over its wires.

The general powers, together with the provisions and restrictions in such corporation shall be as follows:

To sue and be sued by the corporate name, to have and use a common seal, which it may alter at pleasure; if no common seal, then the signature of the name of the corporation by any duly authorized officer shall be legal and binding; to purchase and hold or receive by gift, in addition to the personal property owned by said corporation any real estate necessary for the transaction of the corporation business; and also to purchase or accept any real estate in payment or part payment of any debt due the corporation, and sell realty for corporation purposes; to establish by-laws, and make rules and regulations not inconsistent with the laws and the constitution, deemed expedient for the management of corporate affairs, and to appoint such subordinate officers and agents in addition to President and Secretary or Treasurer as the business of the Corporation may require; designate the name of the office and fix the compensation of the officers.

The following provisions and restrictions are coupled with said grant of powers: A failure to elect officers at the proper time does not dissolve the corporation, but those in office hold until the election or appointment and qualification of their successors. The term

of all officers may be fixed by the by-laws of the corporation;  
 325 the same not, however, to exceed two years. The corporation may by by-laws, make regulations concerning the subscription for or transfer of stock; fix upon the amount of capital to be invested in the enterprise, the division of the same into shares; the time required for payment thereof by the subscriber for stock; the amount to be called for at any one time; and in case of failure of any stockholder to pay the amount thus subscribed by him at the time and in the amounts thus called, a right of action shall exist in the Corporation to sue said defaulting stockholder for the same. The Board of Directors, which may consist of five or more members, at the option of the Corporation, to be elected either in person or by

proxy by a majority of the votes cast, each share representing one vote, shall keep a full and true record of all their proceedings; and an annual statement of receipts and disbursements shall be copied on the minutes, subject at all times to the inspection of any stockholder.

The book of the Corporation shall show the original or subsequent stockholders, their respective interests; the amounts which have been paid on the shares subscribed, the transfer of stock, by and to whom made; also other transactions in which it is presumed a stockholder or creditor may have an interest. The amount of any unpaid stock due from a subscriber to the corporation shall be a fund for the payment of any debts from the Corporation; nor shall the transfer of stock by any subscriber release him from payment, unless his transferee has paid up all or any balance due on said original subscription.

By no implication or construction shall the corporation be deemed to possess any powers except those hereby given or necessarily implied from the the nature of the business for which the charter is granted; and by no inference whatever shall said corporation possess the power to discount notes or bills, deal in gold or silver coin issue any evidence of debt as currency buy or sell any agricultural products, deal in merchandise, or engaged in any business outside the purposes of this charter.

The rights is reserved to repeal, annul or modify this charter. If it is repealed, or the amendments possessed, being not merely auxiliary but fundamental, are rejected by a vote, representing more than half the stock, the corporation shall continue to exist for the purpose of winding up its affairs; but not to enter upon any new business. If the amendments or modifications, being fundamental, are accepted by the Corporation, as aforesaid, in a general meeting called for that purpose any minor, married woman, or other person under disability, or any stockholder not agreeing to the acceptance of the modification, shall cease to be a stockholder; and the Corporation shall be liable to pay said withdrawing stockholder the par value of their stock, if it is worth so much, if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholder as aforesaid: Provided, that the claims of all creditors are to be paid in preference to such withdrawing stockholders.

A majority of the Board of Directors shall constitute a quorum and shall fill all vacancies until the next election. The first Board of Directors shall consist of the five or more corporations who shall apply for and obtain the charter. The said Corporation may have the right to borrow money and issue notes or bonds upon the faith of the corporate property, and also to execute a mortgage or mortgages as further security for repayment of money thus borrowed.

327 Annually, during month of January, the President shall make and publish in a newspaper printed in the County where the principal office of business is located, or if no newspaper is printed in that County, then in an adjoining or the nearest County where a newspaper is printed, a sworn statement showing the amount of the

Capital stock and the existing liabilities, and a list of the names of the stockholders.

Nothing but cash shall be taken in payment of any part of the Capital stock, or land at a fair cash valuation, and no loan of money shall at any time be made to any stockholder thereof; and any such loan, shall render the directors consenting thereto individually liable for the amount — this liability to extend in favor of the innocent stockholders as well as creditors. The making of a false statement to be printed as aforesaid shall render all persons assenting thereto individually liable to all persons dealing or trading with said company upon the faith of said fraudulent statement. If the indebtedness of said company shall at any time exceed the capital stock paid in, the Directors assenting thereto shall be individually liable to the creditors for such excess. The stockholders are jointly and severally liable individually at all times for all moneys due and owing to the laborers, servants, clerks and operatives of the company, in case the Corporation becomes insolvent.

If the Directors declare any pay any dividend when the company is insolvent, on which the declaration of a dividend would diminish the amount of the capital stock, they shall be jointly and severally liable to creditors for the amount of dividends thus declared.

328 Any director may avoid liability by voting against the dividend, or by filing his objection in writing as soon as he ascertains a dividend has been made.

Said Corporation may construct telegraph and telephone lines, and other lines for conveying electricity for any of the purposes above herein already enumerated, and erect the necessary fixtures along the line of any public highway, the streets of any village or city, across rivers or any land belonging to the State free of any charge, and also over the lands of private individuals in pursuance of the general law authorizing condemnation of the easement of right of way of internal improvement, as set forth in section 1325 to 1348 in the Code, both inclusive.

The said Corporation shall, in all cases of war, insurrection, civil commotion, or for the arrest of criminals, give immediate dispatch, at the usual rates, to any message sent by any officer of the State or of the United States.

All messages, including those received from other telegraph or telephone companies, shall be transmitted in the order of their delivery, correctly and without unreasonable delay, and shall be kept strictly confidential, subject, however to disclosure in any legal proceedings.

To enable the company to carry on any or all of the works for which it is hereby incorporated, they are hereby authorized and empowered to lay down pipes and extend conductors through the streets, lanes and alleys of any town, city or village in which they may do business, in such manner, however, as to produce the least possible

inconvenience to the town, city or village or its inhabitants, or to travellers, and to take up pavements and sidewalks, provided they replace the same with the least possible delay.

329 We, the undersigned apply to the State of Tennessee by virtue of

the laws of the land for a charter of incorporation for the purpose and with the powers declared in the foregoing instrument.

Witness, our hands, the first day of February, 1882.

S. T. CARNES.  
W. C. FOWLKES.  
F. M. NELSON.  
W. W. THACHER.  
WM. B. P. MADDOX.

STATE OF TENNESSEE,  
*Shelby County:*

Personally appeared before me, John J. Shea, Deputy Clerk of the County Court of said County, S. T. Carnes, W. C. Fowlkes, F. M. Nelson, W. W. Thacher and W. B. P. Mattox the within named petitioners, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand at office, this 3rd day of Feb. A. D. 1882.

JNO. J. SHEA,  
*Deputy Clerk.*

STATE OF TENNESSEE,  
*Shelby County:*

The foregoing instrument, with Clerk's certificate was filed in my office for registration February 3, 1882, at 10:45 a. m. and  
330 noted in Note-Book No. 10, Page 10 and was recorded next day.

F. R. HUNT, *Register,*  
By J. A. O. BROUGHTON, *D. R.*

I, David A. Nunn, Secretary of State of the State of Tennessee, do hereby certify that the foregoing instrument, with certificates of acknowledgement of Probate and Registration, was filed in my office for registration on the 8th day of February, 1882; and recorded on the 8th day of February, 1882, in Corporation Record Book G in said office page 73.

In Testimony Whereof, I have hereunto subscribed my official signature; and, by order of the Governor, affixed the Great Seal of the State of Tennessee, at the Department in the City of Nashville this 8th day of February A. D. 1882.

D. A. NUNN,  
*Secretary of State.*

The foregoing certificate was received and recorded in my office February 10th, 1882.

331

Y.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS.

EXHIBIT No. "A-2" TO AGREEMENT OF COUNSEL.

Filed March 14th, 1908. Dan F. Elliotte, Clerk.

*Agreement* to the Charter of the Memphis Telephone and Electric Company proposed and adopted by a majority of its Stockholders in a general meeting called for that purpose.

In said general meeting it was unanimously resolved that the following amendment be made a part of the Charter of said Company to-wit:

Said corporation is hereby authorized and empowered to have and organize a Power Department as a part of its Corporate Powers and purposes to be styled "The Power Department of the Memphis Telephone and Electric Company" which department it may operate as a part of or in connection with its Telephone business or such power department may be operated separate and distinct from the said Telephone business, as the directors of said company may from time — time determine and direct. To this end said corporation is hereby empowered and authorized in its Power Department to accept, have and hold by gift, transfer, purchase lease or otherwise any and all such real estate, personal and mixed property,

332 steam engine and machinery and all appliances thereof Electrical Machinery, apparatus and appliances as the Directors of the same may deem necessary and proper for the successful operation of said Power department said Company may sell or lease any of its real Estate and let or hire any of its personal property or all of the same, or any or all of its machinery steam and electrical, and the apparatus, and appliances of the same, to any other Power Company, Electric Light Company, or any other company upon such terms as may be agreed on, and full power and authority is hereby given to do and perform all of the above and all other things which its Directors may deem proper and necessary for the successful operation of said Power Department, and each machinery apparatus and appliances said company use and apply and operate in such manner and for such purposes as its Directors may from time to time determine and direct. In case of the sale or transfer of The Memphis Telephone and Electric Company, its franchise powers property and privileges said Power Department may be also sold or transferred or it may be retained as the Directors may determine



and direct, at a general meeting of the stockholders of the Memphis Telephone and Electric Company" called for that purpose and held in Memphis, Tennessee, on this 26th day of April, 1883, the following resolution was adopted, by a majority of the Stockholders of said Company towit:

Resolved that the foregoing amendment to the charter of this company by and the same is hereby adopted as a part of the present charter of this company and that application for the granting of said Amendment be and the same is hereby made to the State of Tennessee, in pursuance of the laws of the land, and the Statutes in such cases made on provided.

333 [SEAL.]

S. T. CARNES, *Pres't.*

G. C. WOODRUFF, *Sec'y.*

STATE OF TENNESSEE,  
*Shelby County:*

Personally appeared before me J. E. Lewis Deputy Clerk of the County Court of said County, Memphis Telephone & Electric Company, by S. T. Carnes, Prest., and G. C. Woodruff, Sectry. the within named bargainers with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand, at office thos 30th day of April A. D. 1883.

J. E. LEWIS,  
*Deputy Clerk.*

STATE OF TENNESSEE,  
*Shelby County:*

The foregoing instrument was filed in my office April 30, 1883 at 10:15 a. m. and noted in Note Book No. 10 page 94 and recorded on the same day.

JNO. F. McCALLUM, *Register.*  
W. S. POPE, *D. R.*

I, D. A. Nunn, Secretary of the State of Tennessee, do hereby certify that the foregoing instrument with certificates of acknowledgement of Probate and registration, was filed in my office for registration on the 3rd day of May, 1883, and recorded on the 3rd day of May, 1883 in Corporation Record Book G, in said office page 516.

334 In Testimony Whereof, I have hereunto subscribed my official signature and by order of the Governor, affixed the Great Seal of the State of Tennessee, at the Department in the City of Nashville this 3rd day of May A. D. 1883.

[The Great Seal of the State of Tennessee.]

D. A. NUNN,  
*Secretary of State.*

STATE OF TENNESSEE,  
Shelby County:

The above certificate was recorded on the 11th day of May, 1883.

W. S. POPE,  
Deputy Register.

335

Z.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY  
vs.  
THE CITY OF MEMPHIS.

*Exhibit "C" to Agreement of Counsel.*

Filed March 14th, 1908. Dan F. Elliott, Clerk.

In the Chancery Court of Shelby County, Tennessee.

No. 14743.

THE CITY OF MEMPHIS  
vs.  
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

To the Honorable F. H. Heiskell, Chancellor, etc.:

Your Complainant, the City of Memphis, would respectfully represent and show unto the Court that it is a municipal corporation created by and existing under the laws of the State of Tennessee, and that the defendant, Cumberland Telephone & Telegraph Company, is a corporation creating and existing under the laws of the State of Kentucky having an office and transacting a general business of a telephone company in the City of Memphis, Shelby County, Tennessee.

336 Complainant would further show to the Court that on December 20, 1904, the Legislative Council of the City of Memphis, passed an ordinance enacting that each and every telegraph or telephone company operating in the City of Memphis and occupying its streets, alleys and public grounds within the City with its poles and wires shall pay a rental of \$2.00 per annum per pole, each pole enacted by said company in the streets and public grounds of the City of Memphis. A copy of said ordinance is hereto attached and marked Exhibit "A" to this bill, but not to be copied unless called for.

Complainant would further show to the Court that on February 25, 1902, the Legislative Council passed an ordinance regarding such

companies to pay the sum of \$3.00 per annum per pole. A copy of said ordinance is hereto attached and marked Exhibit "B" to this bill, but not to be copied unless called for.

Complainant would further show to the Court that, as shown in said ordinances, it is provided that the failure upon the part of the telegraph and telephone Company to comply with said ordinances, by payment within 20 days after the enactment, shall affect a revocation of its license to occupy its streets, alleys and public grounds with its poles and wires.

Complainant shows unto the Court that the defendant has, in the City of Memphis, a large number of poles which have been erected for the purpose of carrying on its telegraph and telephone business, and that the said poles occupy the streets, alleys and public grounds of the City of Memphis. In addition, defendant has enacted guy-poles, wires and dug holes in the streets and constructed its lines of telegraph poles and wires exposing additional burdens upon the streets and causing serious and permanent inconvenience to  
337 the public.

Complainant would further show to the Court that on December 9, 1907, it rendered its bill to the defendant in the sum of Sixty Thousand Five Hundred and Seventy (\$60,570.00) Dollars for the pole rental under said ordinance, and demanded payment of said rentals. A copy of said Bill is hereto attached and made exhibit "C" to this bill, but not to be copied unless called for. The defendant refused to pay said bill, and the same remains unpaid to this date.

Premises Considered, Complainant prays that the defendant named in the caption be made such by the issuance of subpoena and copy; that it be required to answer this bill but not upon oath, that being expressly waived; that a decree be rendered against the defendant, the Cumberland Telephone & Telegraph Company, for said sum of Sixty Thousand Five Hundred and Seventy (\$60,570.00) Dollars, or if, in the opinion of the Court such decree would not be proper complainant prays that the rights of the defendant in and to the streets, highways, alleys and public grounds of the City of Memphis be declared forfeited, and that the license to use the same be revoked and that its occupation of said streets be determined and that the defendant shall cease to occupy the same. Complainant prays for all other, further, general and special relief as to equity and good conscience may belong.

(Signed)

THOS. JACKSON &  
JAMES L. McREE,  
*Solicitor for Complainant.*

338 STATE OF TENNESSEE,  
*County of Shelby:*

Come James L. McRee, and makes oath that he is the Attorney for the complainant, and that the facts set out in the foregoing bill are true except those stated upon information and belief, and these he verily believes to be true.

(Signed)

JAS. L. McREE.

Sworn to and subscribed before me the 24th day of December, 1907.

W. M. COX, D. C. & M.

Ex. A.

### Ordinance.

Be it ordained by the Legislative Council of the City of Memphis:

SECTION 1. That any telegraph or postal telegraph company or other company or person, occupying the streets, alleys or public grounds of or within the limits of the City of Memphis, with telegraph poles and wires, shall, as a condition of further such occupancy, pay to the City annually the sum of \$2.00 per each of said poles, such payment to begin from January 1, 1894, in respect of all such poles that were erected prior to that date; and from the date of erection as to such as have been erected since that date.

SECTION 2. That the license to occupy the streets, alleys or public grounds with such poles and wires be, and the same is hereby revoked as to any company or person that shall fail or neglect for twenty days after the passage of this ordinance to pay the said sum of \$2.00 per pole for the year 1894.

339 SECTION 3. That after the year 1894 the said company shall pay on the basis herein indicated within the first twenty days of the month of January, and upon failure or refusal so to pay, the said license shall, without more, be and stand revoked.

Passed third and final reading December 20, 1894.

(Signed)

W. L. CLAPP, Mayor.

Attest:

J. F. WALKER, Secretary.

### Pole Rental Ordinance.

SECTION 1. Be it Ordained by the Legislative Council of the City of Memphis, that sub-section 50-A of Section 22, of the City Digest of 1898, be and the same is hereby amended so as to provide that hereafter every person, firm or corporation doing a telegraph, postal telegraph, or telephone business in the City of Memphis, and occupying the streets, alleys or public grounds of or within the limits of the City of Memphis with telegraph poles and wires, shall as a condition to such further occupancy, pay the city annually a rental in the sum of (\$3.00) dollars for each of said poles, and this rental shall be paid upon all poles now erected as well as those hereafter erected.

SECTION 2. Be it Further Obtained. That the license to occupy the streets, alleys or public grounds with such poles and wires be and the same is hereby revoked as to any person, firm or corporation that shall fail or neglect for twenty (20) days after the pas-  
340 sage of this ordinance to pay the said sum of \$3.00 per pole for the current year of 1902.

Passed final reading February 25th, 1902.

(Signed)

J. J. WILLIAMS, Mayor.

Attest:

W. B. ARMOUR, Secretary.

(Book E, Legislative Council, page 615.)

A true copy, this December 23rd, 1907.)

TOM. V. VIGUS,  
Asst. City Register.

Exhibit B.

MEMPHIS, TENN., Dec. 9, 1907.

Cumberland Telephone & Telegraph Company, City, To the City of  
Memphis, Dr.

To pole rental for use of streets, alleys, etc., as per ordinance passed  
Feb'y 25, 1902, as follows:

For the year- 1904, 4226 poles at \$3.00 per pole .....	\$12,678.00
For the year 1905, 4226 poles at \$3.00 per pole .....	12,678.00
For the year 1906, 5969 poles at \$3.00 per pole .....	17,607.00
For the year 1907, 5869 poles at \$3.00 per pole .....	17,607.00
	<hr/> \$60,570.00

Exhibit "C."

341 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS.

EXHIBIT "D" TO AGREEMENT OF COUNSEL.

Filed March 14th, 1908. Dan F. Elliotte, Clerk.

In the Chancery Court of Shelby County, Tennessee.

No. 14,743 R. D.

THE CITY OF MEMPHIS

vs.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

The Answer of the Cumberland Telephone and Telegraph Company  
to the Bill of Complaint Hereto Filed Herein.

This respondents, the Cumberland Telephone & Telegraph Com-  
pany, reserving the right to except — said Bill of Complaint for its  
many errors and insufficiencies, to so much thereof as it is advised it  
is material for it to answer, answering says:

## I.

It admits that the complainant, the City of Memphis, is a municipal corporation, duly chartered and existing under the laws of the State of Tennessee; that Respondent is also a corporation chartered and existing under the laws of the State of Kentucky and that it has complied with the laws of the State of Tennessee, 342 and is engaged in conducting the business of a telephone exchange in the said City of Memphis, and in the territory adjacent thereto in the County of Shelby, State of Tennessee.

## II.

Respondent denies the correctness of the averment contained in the body of the bill of Complaint to the effect that, on December 24, 1904, the Legislative Council of the City of Memphis passed an ordinance enacting that each and every telegraph or telephone company operating in the City of Memphis and occupying its streets, alleys and public grounds within the City, with its poles and wires should pay a rental of \$2.00 per annum, per pole, upon each pole erected by said companies in the streets and public grounds in said City. Respondent supposes that it was intended to be averred by Complainant that, an ordinance of the character indicated was passed on December 20, 1904; and the correctness of this supposition is made obvious by referring to Exhibit A, which purports to be a copy of said ordinance, and which shows that the same was passed on the date last above named, and not on the date averred in the body of the Bill of Complaint.

Respondent will, therefore, treat the Bill as though it has averred the correct date of the passage of said ordinance, to wit: December 20, 1894.

Respondent admits that, on the date named, said ordinance was enacted, but it denies that it applied to it, for the reasons that on its face it is intended to be applicable alone to persons or corporations engaged in operating "telegraph lines" and not to persons or corporations conducting a telephone business.

343 Respondent avers, in this connection, that it is now, and has from the beginning, been engaged in operating a telephone system, including a telephone exchange in said city and elsewhere, connected together with toll lines.

## III.

Further answering, Respondent admits that the Legislative Council of said City on the 25th day of February, 1902, amended subsection 50-A of section 22 of the City Digest of 1898—which is the ordinance of December 20, 1894 above referred to—by providing that, thereafter persons or corporations engaged in the telegraph, postal telegraph or telephone business in said City, and occupying its streets, alleys and public grounds with telegraph poles and wires shall, as a condition of further occupancy, pay to the City annually a rental of \$3.00 for each of said poles either then, or thereafter erected; and that said ordinance further attempted to revoke the license to occupy said streets, alleys and public grounds theretofore

granted any of said companies which, for twenty days after the same became due, failed to pay the pole rental aforesaid; and that Exhibit B to the Bill of Complaint is a correct copy of said ordinance. But Respondent denies that said ordinance is applicable to it, or that it is valid and legal, and on the contrary avers it to be null and void for the reasons hereinafter set forth.

## IV.

Your respondent further answering says, that in the latter part of December, 1879, Samuel T. Carnes acquired the right from the Taxing District of Shelby County, Tennessee,—now the City of Memphis, to construct and operate a telephone exchange in said  
344 Taxing District, and in consideration for said right, agreed, among other things, to allow said Taxing District to use Respondent's poles for its alarm system; and the City has availed itself of this right by placing its fire alarm wires on Respondent's poles, and the same are now on said poles and in use by the City. In pursuance of this grant, the said Carnes directly after it was made, did begin and push rapidly to completion his telephone exchange, and continuously operate the same until the year 1881, when he transferred and assigned all of his interest therein to the Memphis Electric Telephone Company which was duly chartered and organized under the laws of Tennessee, and thereafter, said company continuously operated the same until the year 1883 when it transferred all its rights and properties to this respondent, the Cumberland Telephone & Telegraph Company. At the time Respondent thus became the owner of said exchange, the use of the telephone was limited, and the Memphis exchange was a small affair with a few hundred subscribers, and sphere of operations was limited to the territory embraced in the then City of Memphis, which covered only about four square miles. As Memphis increased in population, and its business interests grew and enlarged, and as the knowledge of the convenience and value of the telephone as an adjunct to business and as a means of easy and quick communication became more generally understood, the business of the Memphis exchange steadily, grew, so that it became necessary from time to time to plant new poles and to extend new wires into larger areas of territory, both in said city and in the territory contiguous thereto in Shelby County, Tennessee.

345 Respondent further shows that the Legislature of the State of Tennessee enacted a law, which was approved, and became effective on the 25th day of March, 1885, which, among other things, authorized any person or corporation organized by virtue of the laws of Tennessee, or of any other State of the United States, or, by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence which may be thereafter invented or discovered to construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence, along and over public highways and streets of the Cities and towns of the State of Tennessee, or across or under waters and over lands or public works belonging to the State, and on and over the  
26—215



lands of private individuals, and upon, along and parallel to any of the railroads or turnpikes of Tennessee and on and over the bridges, trestles and structures of said railroads, with the proviso that the ordinary use of such public highways, streets, works, railways, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of the waters impeded, and that just damaged shall be paid to the owners of said lands railroads and turnpikes by said telephone or telegraph corporations.

The right of eminent domain was also granted to such companies by said Act.

There were various other provisions which required, under certain conditions therein named, the said companies to give preference to the authorities of the State or Federal Government under penalties, and regulations the operations of said companies in divers  
 346 ways in the interest of the general public which need not here be particularly set forth.

Said act is Chapter 66 of the Sessions Acts of 1885, beginning at page 120.

Your respondent further shows that with the growth of said Taxing District and City, it met the increased demand of its patrons for telephone service and enlarged the sphere of its operations, both in said City, and in the County of Shelby adjacent thereto, where it had many hundreds of Telephone poles, and that after it has erected these poles outside of the City limits, and connected the wires on same with its exchange in the said City, the greater portion of this territory outside of the City which it thus served was, in the year 1898, incorporated within the City limits; so that from an original territory of about four miles, there was included more than thirteen square miles; and Respondent's exchange has already grown until now it has more than 7500 telephones in active operation.

Respondent avers that, from the beginning and during the entire time since its ownership of said exchange in said City and its operations therein, and in the territory adjacent thereto, neither the Taxing District authorities nor those of the City of Memphis have ever denied Respondent's indefeasible right to exercise its franchise in the operation of its said exchange under said grant, and on the faith of the grants and authority of the State, it has expended more than one million dollars in the construction and development of its telephone system, and at a great additional cost has connected its long distance lines, extending through and over the State of Illinois Indiana, Kentucky, Tennessee, Mississippi and Louisiana, with said exchange, and this furnishing to the citizens of the City of Memphis  
 347 direct communication over this vast area of territory to their great convenience and benefit.

And respondent avers that it has never set any poles in said City without first securing the permission of the proper municipal authorities.

In addition to this, and in the year 1900, the municipal authorities of the City of Memphis passed what is known as a conduit ordinance, which required respondent, and all other companies occupying the streets and alleys with a large area of the City of Memphis with their poles and wires, to build conduits and remove their poles

and overhead wires and operate underground through said conduits. This ordinance was obeyed by this respondent at a cost of many thousands of dollars to it.

Therefore Respondent avers that, it having in good faith accepted said grants, and availed itself of the provisions of said Act of 1885, and having expended large sums of money upon the faith thereof, and having in all respects lived up to its several provisions, it is advised that said City cannot now by said ordinance, or otherwise interfere with this Respondent in its Legitimate use of the streets, alleys and public grounds of said City with its poles and wires, and especially, that it cannot claim or demand of Respondent an annual rental for the use of the streets with its said poles and wires as is done in said ordinance; but that said grants and contracts long since ripened into a contract between said City and this Respondent, which will be protected by the State and Federal Constitutions.

#### V.

Further answering, Respondent says that said ordinance is invalid and void because, although nominally an imposition of \$3.00 annually upon each and every pole of Respondent's in the streets, alleys and public places of said City, as fixed in said ordinance is termed therein a "rental," in point of law and fact it is simply the imposition of a tax to that amount upon Respondent by the City for the privilege of carrying on its business in said City; and Respondent avers that no authority is given to the City by its Charter, or the general laws of the State of Tennessee to levy a tax of this description upon it. Said rental or tax is unreasonable, exceeds the profits accruing to Respondent from the use and operation of said exchange.

#### VI.

Further answering, Respondent avers that it has expended in the erection of its telephone plant in said City More than one Million dollars, and that the same has been constructed intelligently and economically, and is reasonably worth that sum; that during the year 1906 its net earning as the result of the operations of its plant for said year was only \$22151.26 which was only about 2.18% upon the actual capital invested. It has not yet exactly computed the result of its operations for the year 1907, which is just ending, but in view of the increased cost of material, wages, and all other items entering into the operation of a telephone exchange, and with a knowledge of the gross receipts which it has derived from its operations, it is enabled to see and avers that the net result of its operations in 1907 will not be as favorable as the result above set forth in 1906.

The addition, therefore, of a tax to this amount, whether disguised under the name of "rentals" or by whatever name it may be called, is not only unreasonable and oppressive, but is in truth confiscatory of Respondent's property; and Respondent avers that it is, in effect, a discrimination against it, in that it lays heavier tax burdens upon it than it does upon other citizens in like

situations, and that, in effect, it deprives Respondent of its property without due process of law, and hence is not only in violation of the constitution and laws of the State of Tennessee, but also of the Fourteen- Amendment of the Constitution of the United States.

## VII.

Further answering, Respondent says that a suit was instituted in this Honorable Court by the City of Memphis against this Respondent to recover the amount alleged to be due by this Respondent to the City of Memphis for rental upon its poles planted in the streets of the said City pursuant to the provisions of said ordinance of February 25, 1902, for the years 1902 and 1903. There was a compromise agreement entered into between the City of Memphis and this Respondent covering said years by the terms of which, among other things, the said suit was dismissed, and Respondent agreed that its charges to its patrons for telephonic service should not exceed an average per station of one dollar per week until the number of stations connected with its exchange should exceed seven thousand, when the limitation upon the charges fixed should cease; that Respondent should furnish free to the City for the use of the police and fire alarm wires of said City, one duct in its underground system, and such additional system as it should thereafter construct from time to time, together with the necessary and proper space in

the various man-holes for the use of said wires; that Respond-  
350 ent should also furnish free for the use of the police and fire alarm wires of the city, space upon the poles now or hereafter erected, and should erect up-rights and cross-arms of such reasonable dimensions and construction as the City may direct upon the top of its poles for the placing of the said City wires; that respondent should establish and erect a ringing circuit, and furnish bells and generators for the same, in all the fire engine houses of said City then used or thereafter established, and erect a twelve drop switch-board for the police station of said City, and extension lines for eight desk sets in the police station of said City, and should also furnish telephones free of charge to the City Secretary's office, Mayor's office, Board of Health, two Crematories, Engineer's office, City Stables, City Hospital, and the same service to public school buildings as then rendered and that the performance of these requirements should be a continuing obligation upon the part of respondent as long as it should exercise any rights to do a telephone business in the City of Memphis.

Moreover, said contract expressly provided that the right of the City to claim pole rentals for the year succeeding 1903 and the right of this respondent to resist said claim, should remain unimpaired and unaffected by said contract.

A copy of said contract is hereto attached and marked Exhibit "A"; but the same need not be copied.

Respondent refers to this contract for the purpose of showing that said City recognized Respondent's rights to be in the streets in pursuance of said grants above referred to in the Act of 1885; and that

351 Respondent, for the sake of peace, and in the interest of the general public, assumed these burdensome obligations, which it has always since that time and now fully complied with, and still complies with in every respect; and in view of the premises, Respondent avers that the City is estopped to deny Respondent's grants and rights to occupy the streets of said City with its poles and wires, or to impose any additional impositions upon Respondent for the use and occupation thereof.

## VIII.

Respondent further answering, charges that the attempt upon the part of the City of Memphis to enforce said pole rental ordinance, violates the contract existing between the Respondent and said City on account of the grants made to it and the recognition on the part of the City authorities for so long a time respondent's right to engage in a telephone business by using the streets, alleys and public places for the erection of poles and the stringing of wires thereon; and that said attempt violates the Constitution of Tennessee, prohibiting the violation of the obligation of a contract, and also violates the fourteenth amendment of the constitution of the United States in that it deprives your respondent of its property without due process of law.

And your respondent further avers that the State of Tennessee, through its Legislative department, granted to Respondent the right to occupy the streets of said City and imposed certain terms and conditions upon respondent in consideration of said right and grant, and that the City authorities are wholly without authority or power to impose any additional condition or burden upon Respondent as a condition for the further exercise of its State granted right.

352 And respondent pleads these matters in bar to the complainant's right asserted in this bill, in addition to the unreasonableness of said ordinance.

Wherefore, having fully answered, this Respondent prays to be hence dismissed with its reasonable costs.

\_\_\_\_\_,  
\_\_\_\_\_,  
*Sol's for Respondent.*

353

BB.

UNITED STATES OF AMERICA,

*Western Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit.

Proceedings had in said Court at a regular term thereof begun and held for its May Term, A. D. 1908, at the United States Court House, in the City of Memphis, in said District, on, to-wit, the 27th day of May, A. D. 1908, in the following cause, to-wit:

No. 628. Equity.

THE CUMBERLAND TELEPHONE &amp; TELEGRAPH COMPANY

VS.

THE CITY OF MEMPHIS et al.

This case came on to be heard on this the 27th day of May, 1908, before the Honorable Walter Evans, District Judge, sitting herein and on a motion of defendants to extend the time for taking proof herein, and the same having been fully argued, it is hereby ordered, adjudged and decreed that the said motion be and the same is hereby overruled.

354

CC.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE &amp; TELEGRAPH CO.

VS.

THE CITY OF MEMPHIS et al.

*Deposition of Robert E. Moran.*

Filed June 2nd, 1908. Dan F. Elliotte, Clerk.

The deposition of Robert E. Moran, taken by consent in the City of Memphis on this, Tuesday, June 2nd, 1908, 9 A. M. to be read as evidence on behalf of the defendants City of Memphis et al. in the above styled cause. Caption and certificate and all formalities are expressly waived, the right to except for irrelevancy and incompetency alone are reserved.

Present: E. E. Wright, Solicitor for the Cumberland Telephone and Telegraph Company, and M. G. Evans, Solicitor for the defendants, the City of Memphis et al.

The said witness, R. E. MORAN, being first duly sworn, deposed as follows:

355 Direct examination.

By M. G. EVANS:

Q. State your name, age, residence and occupation?

A. R. E. Moran, 9 South Orleans Street, City Electrician, 43 years old.

Q. What connection have you, if any, with the City of Memphis?

A. I represent them in all electrical matters.

Q. How long have you been City Electrician for the City of Memphis?

A. This is my 24th year.

Q. Mr. Moran state what your duties are with reference to the location, placing and shifting of poles of wire using companies upon the streets of the City of Memphis?

A. It is my duty to locate all poles set in the City of Memphis.

Q. Are you familiar with the number of poles that have been required to be shifted or relocated in the City of Memphis during the years from 1899 up to January 1st, 1907?

A. Yes sir.

Q. With reference to the poles of the Cumberland Telephone Company in the City of Memphis, has the City required them to shift many or few poles comparatively during this period?

A. That is something we have never kept a record of. Whenever we change the street, the City engineer orders the poles kicked inside of the curbing, then it becomes my duty to see that the poles, if they are fit to be reset, to be put back in the proper shape, or new ones to be set in place.

Q. Explain what you mean by the term, Kicking in poles?

A. In case they go to make a permanent improvement by setting curbing; that is the only time we disturb poles; and sometimes we widen the street, the poles have to be moved in to get inside the new curb line; sometimes they narrow the street and they have to be moved out to the curb.

Q. Did I understand you to say that all this moving is done under your supervision as City Electrician?

A. Yes sir.

Q. Have you made an approximate estimate of the average number of poles which the City requires the Cumberland Telephone and Telegraph Company to shift from 1899 to January 1st, 1907?

A. Yes Sir.

Q. Please state what that number was?

A. Since my attention was called to this matter, I refreshed my memory and the average is about 250 poles to the year.

Q. Do you mean that during the years from 1899 to January 1st, 1907, the average number of poles per year that the City has required the Cumberland Telephone Company to shift is about 250?

A. Yes sir.

Q. Please state the cost of moving one of these poles in the way that they are required to be moved?

A. The average cost, the whole of them together, would be about \$4.00 per pole for the labor.

Q. State whether or not all other wire using companies have been required to shift their poles in the same manner when the occasion arose for it?

A. Yes sir, all companies come under the same head.

Q. Please state whether or not there is any way for a wire and pole using company to get their poles in the beginning in such a way that it will not afterwards be necessary to shift them?

A. The proper way for any wire using company before they set poles on any streets is to go to the City Engineer and have him give them stakes.

357 Q. Explain how going to the city of engineer and getting stakes will enable the company to set these poles in such a way they will not be required to shift them?

A. They notify the City Engineer that they have permission to set a line of poles on such and such a street they make application to the City's Engineering Department to furnish them with stakes and they do it.

Q. What do you mean by stakes?

A. Stakes for width of street and give them the curb lines.

Q. Do I understand you to mean that by application to the City Engineer's office such a company could find the grade and width of the street and location of the curb and width of the sidewalk as fixed by the City authorities?

A. Yes sir. There are times after the stakes are driven that when the permanent improvement is under construction, they make changes; such as widening or narrowing the street; then it becomes necessary for the wire using Company to change the same poles.

Q. Do you know of your own knowledge whether any of the poles required to be shifted during the period of time above mentioned were poles that had been set by the Cumberland Telephone Company, without having gotten these specifications from the Engineering Department?

A. Yes, the majority of the poles that have been moved in the last 5 years were poles that were set before the City annexed that part of the City. In other words, it is known as the new district of the City which was taken in about the year 1899. That covers, Poplar, Union, McLean, Central, and Lamar et al. portions.

Q. But you state that the average number of poles per year that was requested to be shifted by the Telephone Company were about 250 per year?

A. Yes sir, that is about the number.

358 Cross-examination:

X Q. Most of the improvements in the City so far as street widening etc. has been done in what is known as the new territory?

A. Yes sir.

X Q. Up to 1899, the City was very small in area, and in that



year, a very much larger territory was taken in and the time became necessary for the City to improve this area and widen the streets etc. and that is the cause of this shifting of the poles is it not?

A. Yes sir, the streets were known as country roads.

X Q. There has been more shifting of poles in the last few years than before, on account of this improvement?

A. Yes, treble it.

X Q. And we now have the Front Foor Assessment, and this will also require a good deal of shifting will it not?

A. Yes sir, it will be on an average of 250 poles per month after this year.

ROBT. E. MORAN.

Sworn to and subscribed before me this the 2nd day of June, 1908.

[N. P. SEAL.]

A. W. KETCHUM,

*Notary Public.*

And further this deponent saith not.

359

II.

UNITED STATES OF AMERICA,

*Western Division of the Western District of Tennessee:*

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof begun and held for its May Term, A. D. 1908, at the United States Court House, in the City of Memphis, in said District, on to-wit the 2nd day of June, A. D. 1908, in the following cause, to-wit:

No. 628. In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

CITY OF MEMPHIS et al.

This cause coming on to be heard on this the 2nd day of June, 1908, before the Honorable Walter Evans, District Judge, and on a motion entered by the complainant to set the above styled case for hearing, and the same having been fully argued, it is hereby ordered, adjudged, and decreed that the said case be and the same is set for hearing on June 10th, 1908.

Enter June 2, 1908.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.  
vs.

THE CITY OF MEMPHIS.

*Stipulation of Counsel.*

Filed June 3rd, 1908. Dan F. Elliotte, Clerk.

It is hereby agreed by and between counsel for both parties that the following evidence shall be admitted upon behalf of the City of Memphis, subject to the exception for incompetency and irrelevancy, which is hereby made by the complainant, the Cumberland Telephone & Telegraph Company; it being further agreed that the grounds of the exception may be more fully set forth at the hearing, if so desired; to-wit: It is hereby agreed that Vinton A. Sears, a witness for the City of Memphis would testify that he compiled Exhibit C. to this agreement, and that subject to exception of the Cumberland Telephone & Telegraph Company, the rates set forth in Exhibit C. are correct, and shall be read as a part of the evidence of the City of Memphis, to-wit: the following being a correct statement of the said rates as set forth in said Exhibit C:

361

Cities.	Rates per annum.		Subscribers.
	Bus.	Res.	
Albany, N. Y.....	48	24	3500
Atlanta, Ga.....	42	30	
Birmingham, Ala.....	36	18	3300
Buffalo, N. Y.....	48	36	7600
Chicago, Ill.....	85	Bus. phones only	10000
Columbus, O.....	40		6000
Cleveland, Ohio.....	72	48	15000
Dayton, Ohio.....	40	24	4000
Elmira, N. Y.....	36	24	4230
Elizabeth, N. J.....	36	30	
Erie, Pa.....	40	28	2300
Fall River.....	36	24	1200
Fort Wayne, Ind.....	36	24	3250
Grand Rapids, Mich.....	36	24	6200
Harrisburg, Pa.....	36	21	
Indianapolis, Ind.....	40	25	9000
Jackson, Mich.....	30	20	2300
Kansas City, Kan.....	54	48	11000
La Crosse, Wis.....	30	24	1500

Lafayette, Ind.....	30	20	2000
Lincoln, Neb.....	36	21	2500
Los Angeles, Cal.....	48	24	16000
Louisville, Ky.....	48	30	8000
Memphis, Tenn.....	48	30	3500
Minneapolis & St. Paul, Minn.....	48	30	14000
Mobile, Ala.....	30	20	600
Muncie, Ind.....	30	18	1600
Philadelphia, Pa.....	80	48	16000
Pittsburg & Allegheny.....	72	58	15000
Portland, Me.....	42	24	2500
Racine, Wis.....	30	18	2100
Rochester, N. Y.....	40	30	7500
Savannah, Ga. ....	40	25	
Scranton, Pa.....	36	24	
Seattle, Wash.....	48	36	6500
San Antonio, Tex.....	36	24	2500
St. Joseph, Mo.....	40	30	
Syracuse, N. Y.....	36	24	2500
Toledo, Ohio.....	48	30	9000
Topeka, Kan.....	36	24	2800
Trenton, N. J.....	36	24	3000
Troy, N. Y.....	40	30	2200
Wilkes Barre, Pa.....	28	24	
Wilmington, Del.....	36	24	
York, Pa.....	48	24	2500
St. Louis, Mo.....	72	48	13000

The said Exhibit C. likewise shows as follows:

The Bell Telephone Company has in force the following rates in the cities set out below; the number of subscribers being also placed opposite each city:

362	Cities.	Subscribers.	Bus. rate per annum.
	Philadelphia .....	40000	\$60.00
	Pittsburg .....	18000	55.00
	Cleveland .....	25000	84.00
	Grand Rapids .....	3000	30.00
	Indianapolis .....	6500	45.00
	Syracuse, N. Y. ....	6500	40.00

It is further agreed that the contracts hereto, marked Exhibit "A" and Exhibit B" respectively, are correct copies of the contracts which the Cumberland Telephone & Telegraph Company has entered into with the cities of Evansville, Ind., and Nashville, Tennessee, and that the said Company is *as* the present time operating its telephone system under said contracts.

It is further agreed that the Legislative Council of the City of Memphis before the ordinance in controversy was introduced before the Council for passage, appointed a committee to investigate the

subject of telephone rates, and especially the rate charged by the Cumberland Telephone & Telegraph Company in the City of Memphis, and to frame an ordinance fixing a reasonable rate to be charged in the City of Memphis by telephone companies operating in the City of Memphis. The said Committee informed itself as to the rates charged by the various telephone companies in the principal cities of the United States, and heard arguments from representatives of the Cumberland Telephone & Telegraph Company and also from citizens of Memphis. That upon said investigation and consideration of the subject of telephone rates, the said Committee prepared the ordinance in controversy and reported it to the Legislative Council of the City of Memphis as an ordinance fixing reasonable rates to be charged by telephone companies in the city of

363 Memphis, and that the ordinance was then passed by the Legislative Council.

It is further agreed and stipulated that the representatives of the Cumberland Telephone & Telegraph Company both before the Committee above mentioned as well as the Legislative Council of the City of Memphis, offered to submit its books and vouchers for examination by the city authorities, and asked that the city make such investigation in order to determine the amount of return that was being made upon the investment in the City of Memphis by the Cumberland Telephone & Telegraph Company. The City authorities declined to make an investigation.

It is further agreed and stipulated that the committee did not have before it any witness who testified as to rates in other cities, and did not investigate the conditions surrounding these said rates, but merely took data submitted by citizens of Memphis who were not engaged in the telephone business, but stated that they had made an investigation into the matter of rates, but none of whom had made any investigation whatsoever concerning the business or the affairs of the Cumberland Telephone & Telegraph Company from its books.

It is further agreed and stipulated that, subject to the exception of the City of Memphis for incompetency and irrelevancy, that Henry Noble Hall, special commissioner appointed by the New Orleans Board of Trade, would testify as set forth in Exhibit D, concerning the amount of rates charged by telephone companies: it being further agreed that the grounds of this exception may be more fully set out at the hearing.

It is further stipulated and agreed that any time before the hearing evidence may be introduced by either party concerning the conditions surrounding any of the rates about set forth in

364 this stipulation, and also evidence concerning any other rates in any other cities.

It is further agreed that this stipulation may be filed and used as evidence at any time before the hearing.

This June 2, 1908.

E. E. WRIGHT,  
*Counsel for Complainant.*  
MARION G. EVANS,  
*Counsel for Defendants.*

## EXHIBIT "A" TO STIPULATION.

This agreement, made and entered into this 3rd day of February A. D. 1906, by and between the City of Evansville, Indiana, by and through its Board of Public Works, party of the first part; and the Cumberland Telephone & Telegraph Company, a corporation organized under and by virtue of the laws of the State of Kentucky, party of the second part: *Witnesseth*:

That the City of Evansville, Indiana, by and through its Board of Public Works, under and by virtue of the power conferred upon it by the Act of the General Assembly of the State of Indiana, entitled "An Act governing municipal corporations," approved March 6th, 1905, does hereby authorize and empower the said party of the second part, its successors and assigns, and by the terms of this contract, consent, permission and authority are granted unto and vested in the said party of the second part, subject to any laws and ordinances now in force, or hereafter enacted or put in force as police regulations, the right to lay conduits, with necessary manholes, for the purpose of carrying its wires underground, also to erect and maintain telephone and telegraph poles, of the proper size, and to erect and maintain thereon wires and cables, for telephone uses, in, through and along the streets, avenues, alleys and public places in said city, and to operate a telephone exchange therein and furnish telephone service to its patrons and subscribers, upon the following terms, conditions and limitations, to-wit:

SECTION 1. Said poles and conduits shall be so erected as not to unreasonably interfere with the travel upon the streets and alleys, or the substantial use thereof by the inhabitants of said city; and, said company shall erect its poles only on one side of the streets, and alleys of said city, except for the length of one block upon  
366 the street where its telephone exchange is or may be located or where the wires of said company enter said exchange building; and, for *where the wires of said company enter said exchange building*; and, for one block on either side of the said exchange building; said company shall have the right to erect and maintain poles on both sides of the streets; but, the lowest wires of said company shall not be less than twenty-five (25) feet above the surface of the ground, except where same enter the exchange building or any public or private station. All said overhead wires, poles and cables shall be constructed and placed in a manner satisfactory to the Board of Public Works or said City or Evansville, Indiana.

SECTION 2. Said Cumberland Telephone & Telegraph Company shall within two (2) years from the date of this contract, lay conduits with necessary manholes for the purpose of carrying its wires underground, with- that part and portion of the City bounded as follows: to-wit:

"Beginning at the corner of Water and Pine Streets in the City of Evansville, Indiana, thence along Pine Street to Carpenter Street, thence along Carpenter street to Ingle Street; thence along Ingle

Street to Sixth street; thence along Sixth Street to Vine street; thence along Vine Street to Eighth Street; thence along Eighth Street to Chestnut Street; thence along Chestnut Street to the Ohio River; thence along the Ohio River to the place of beginning; it being understood that the entire width of the streets defining said boundary shall be embraced in, and be a part of the territory within which said underground system is to be constructed."

And said company shall locate, within said district, said conduits and manholes within the alleys so far as possible, and shall  
367 locate and maintain only distribution and service poles within said district, and it shall take down and remove all unnecessary poles, wires and cables, now or hereafter erected in said area, and all conduits manholes and other appliances shall be constructed and erected for service within two years from the date of this contract.

And, the said company further agrees that it will extend and enlarge its underground area in the City of Evansville, in such manner and in such district as may be provided by ordinance of the common Council of the City of Evansville, provided such ordinance or ordinances are made applicable to other like wire-using companies.

Provided that before commencing the work of laying and constructing said underground work and system, said party of the second part shall submit to the Board of Public Works, of said City of Evansville, Indiana, maps, plans and specifications showing where and how such work is to be done, which maps, plans and specifications shall be approved by said Board before such work shall be begun, a duplicate of which maps, plans and specifications shall be filed and deposited with said Board. The parties agree that after maps, plans and specifications are approved by the Board of Public Works of said City of Evansville, and before work is done, the Board may make any changes as to the location of poles, conduits and ducts by notifying the party of the second part of the changes desired, and that after any work has been done, or material placed hereunder, in a completed form with the approval of said Board, no changes of any character therein or location thereof, shall be demanded by said Board, except after reasonable notice being given, and a hearing had before said board by the party of the second part.

SECTION 3. The said party of the second part shall provide and maintain one duct of sufficient size in each and all conduits laid underground as aforesaid, for the sole use of the City of Evansville, and shall also allow the said City the exclusive use of the upper  
gaen on each pole, throughout its system, for the fire alarm  
368 telegraph and police patrol wires of said city—said gaen to be three feet above the next cross arm; said duct in each conduit and gaen on each pole herein provided to be furnished and maintained without cost or charge to said City of Evansville.

SECTION 4. At least forty-eight hours before opening any street avenue, alley or public place, said party of the second part shall notify the Board of Public Works of its intention to do so, and the said party of the second part, and its servants and employees in the laying of any wires or conduits, in excavating and replacing the

earth in any street, avenue or alley, or public place, and on the pavement thereof, shall be under the supervision of the Board of Public Works and shall promptly comply with any order of said Board. The earth removed in making excavations shall be restored and the pavement be relaid by the party of the second party in as good condition as before the making of such excavation. No excavation in any street, avenue, alley or public place shall be allowed to remain open, or said street, avenue alley or public place encumbered for any longer period than shall be necessary to execute the work for which same is made and no greater distance than one square shall be opened at one time, except by and with the consent of said Board, and the work shall be done continuously and speedily completed. It is agreed that the uppermost parts of said underground conduits and ducts used, laid and constructed shall be no less than three feet underground, and nothing herein shall preclude the said city from prosecuting or authorizing any future public work of any character; but in the prosecution of any future public work, or improvement hereafter the said Board shall have the right, if it deems the same necessary to require the temporary removal of any conduit duct or appliance authorized by this contract to be laid, and the same shall be removed or necessary changes made therein by said party of the

second part on the order and requirement of the said Board,  
369 and in case of a failure on the part of said party of the second part to comply with any such order or requirement, relative to such removal or change for the purpose aforesaid, then the said Board may make such removal or change and the necessary cost thereof shall be paid by said party of the second part to the City Comptroller upon proper demand being made therefor. It being expressly understood *understood* that in the construction or repair of said underground system by said party of the second part, no sewer either public or private shall be molested or disturbed.

SECTION 5. It is agreed that all the work of the construction or repair of said underground work and system shall be under and subject to the supervision of inspectors to be appointed by the Board of Public Works, and all necessary expense for the employment of such inspectors shall be paid by the party of the second part to the City Comptroller on demand. The Board of Public Works of said City shall at all times have the right to inspect, superintend and control the construction of the conduits, manholes, and other appurtenances which may be constructed as part of said plant, and to order any change made from time to time, as in its judgment will best subserve public interest; all such changes to be made by party of the second part without expense to the City. In case the said party of the second part shall neglect or refuse to obey any instruction of said Board with respect to any alteration to be made, the said Board is authorized to make the same and collect the cost thereof from the said party of the second part, as hereinafter provided.

SECTION 6. The party of the second part agrees and binds itself that in the construction and repair of said plant it will faithfully observe the conditions herein set forth; that it will properly and effectually guard all openings and encumbrances with such barriers



and lights as will prevent the happening of accidents or or  
370 injuries by reason thereof. The said party of the second  
part also agrees and binds itself to hold the City of Evans-  
ville harmless as against any and all damages done by it in the  
building and construction of its plant underground or aerial; that it  
will at all times make any and all repairs which may be necessary,  
in the judgment of the Board of Public Works of the City of Evans-  
ville, to any of the streets, alleys, avenues or public places by reason  
of the same having been digged into or disturbed, in the construc-  
tion or repair of said plant; that it will not in such construction  
or repair, cut into or remove material from the surface or under-  
neath the surface, of any streets, alleys avenue, or public place with-  
out first obtaining the consent of said Board, that it will pay all  
damages for personal or other injuries that may result from or grow  
out of any work that may be *doen* by or for it in such construction  
or repair; that it will indemnify and save said City harmless from  
any and all liability or expense growing out of, or resulting from the  
construction, or repair of any part of its said plant; that it will,  
upon demand of the City Comptroller of said City, pay any damages  
which may have accrued to said City and any and all judgments  
which may have been obtained and rendered against said city on  
account and by reason of the construction or repair of said plant  
or the occupancy by it of any of the streets, avenues alleys or public  
places in said City; that if the said city shall become involved in  
any action or suit on account of any act or omission of the said party  
of the second part in the construction or operation of its said plant,  
it will, upon notice from said city, or its proper officers, appear and  
defend such action or suit without expense to the city.

SECTION 7. Immediately upon the ratification of this contract, by  
the Common Council of the City of Evansville, the party of the  
second part is to deposit with the City Treasurer of said city  
371 the sum of five hundred dollars (\$500.00) to the credit of  
the Board of Public Works of the City of Evansville and file  
its receipt therefor with the City Comptroller of said City, which sum  
is to be at all times available to said Board in the event the said party  
of the second part should make default in the performance or com-  
pliaance of any order or direction of said Board, regarding the  
repair of any street, avenue, alley or public place in any way dis-  
turbed by said party of the second part in the construction or repair  
of its plant or system as herein provided, and the city Comptroller  
is hereby authorized to issue a warrant against said deposit with said  
City Treasurer whenever the party of the second part refuses, after  
three days' notice to pay any demand made upon it by order of the  
Board of Public Works of said City of Evansville, for its default in  
the performance or compliance of any order or direction issued by  
said Board; and said party of the second part agrees and binds itself  
to replace any sums paid out under order of said Board of Public  
Works and to keep said deposit of five hundred dollars intact during  
the life of this contract.

SECTION 8. The rights, and privileges herein granted to said party  
of the second part shall be for a period of thirty-five (25) years from

the date hereof and for no longer, and said party of the second part hereby binds itself, its successors and assigns, that at the expiration of said period of time it will yield possession of the Streets, alleys, avenues and public places of said city and cease the operation of said telephone plant and system, and should said party of the second part, its successors and assigns, at the termination of this contract, fail to procure from the said City of Evansville, Indiana, a new franchise, then, and in that event, the first party shall have the right to purchase the underground system, at a fair valuation, to be arrived at by agreement of the parties hereto; or, in case of disagreement, by arbitration, each party selecting an arbitrator, and these two

372 selecting a third, the decision of two to be final.

SECTION 9. The party of the second part agrees to, and shall furnish twenty-five (25) free telephones for the use of the city of Evansville, during the life of this contract, same to be placed at such places as may be directed by the Board of Public works; also shall furnish free, one additional telephone for each hose house, engine house or municipal institution, that may hereafter be erected or established by said City; and, said party of the second part to give the telephone in the Mayor's office, in the City Building, connection with its long distance lines for the transmission of any message, exclusively concerning city business, when requested by the Mayor so to do, which connection is to be made without charge or cost to the City of Evansville; and said party of the second part agrees to furnish to said city as many additional telephones as the city and its officers, in the judgment of the Board of Public Works may require, the same to be ordered installed by said Board and paid for by the said City at the schedule of rates herein provided less thirty (30%) per cent; the instruments furnished for the city and its officers to be kept in good order by said party of the second part.

SECTION 10. The party of the second part shall furnish continuous (day and Night) service to all its patrons in the City.

SECTION 11. Said company agrees that so long as it shall exercise its rights and operate a telephone exchange under this contract, that it will in addition to lawful taxes and assessments, pay annually to the City of Evansville, Indiana, three per-centum (3%) of its gross annual receipts from the business of the Evansville exchange, beginning April 1, 1906, which gross receipts shall include 15% of the amount received by the party of the second part at its Evansville exchange, on account of charges for the use of its toll lines radiating from Evansville; and in addition thereto, and as a further

373 consideration for the execution of this contract, said party of the second part agrees to pay to the City of Evansville, Indiana, in cash, upon the ratification and acceptance of this contract, the further sum of \$12,579.45 as liquidated damages and compensation for the occupancy of the streets of said city from the 18th day of July, 1902, to Feb'y 1906.

And said party of the second part hereby agrees to furnish promptly on the 1st day of April 1907, and each and every first day of April thereafter, during the life of this contract a statement, duly and properly verified, under oath, showing the gross earnings of said

Evansville exchange for the preceding year, and it is hereby agreed and understood that the City Comptroller of the City of Evansville, or his delegated representatives, shall have the right and privilege, on demand, to inspect and examine the books, records and accounts of said party of the second part, for the purpose of comparing and verifying any statement as to the gross earnings of said Evansville exchange, which is made the basis for the payment of said revenue of three per cent (3%) herein specified.

SECTION 12. The Cumberland Telephone & Telegraph Company hereby agrees and binds itself to install and maintain such public pay stations as may, in its judgment, be necessary and proper to accommodate the citizens of Evansville, who desire to use the telephone service without becoming regular subscribers; and, during the life of this contract, it agrees that the maximum rates for telephone service shall not exceed the following:

374

For Business Purposes.

Until the number of lines connected with said exchange exclusive of toll lines connected therewith, shall exceed four thousand, five hundred (4,500) the maximum business rate for a direct line shall not exceed.....

.....	\$5.00 per month
For a two party business line.....	4.50 per month
For a four party business line.....	3.50 per month

And the Maximum Residence Rates

Shall in like manner for the same number of subscribers, not exceed for direct line.....

.....	\$2.50 per month
Two party line.....	2.00 per month
Four party line.....	1.50 per month

And thereafter, for each additional one thousand lines connected with said exchange, exclusive of toll line connections, the maximum rate shall not exceed an additional ten per cent (10%) on above rates; it being understood that the number of lines connected, shall be the basis for computation and not the number of phones or instruments connected; and, it is further agreed by the party of the second part that there shall be no increase in the rates heretofore charged to patrons or party lines having more than four stations or instruments, but such rates heretofore charged shall be available and remain in effect to any and all such patrons so long, as said patrons remain the occupants of the premises where said instrument is installed, and hereafter no party lines shall be installed with more than four stations or instruments.

SECTION 13. Said party of the second part agrees to make connections with all bona fide farmers' lines in Vanderburgh, Posey, Gibson, and Warrick Counties, Indiana, upon fair and equitable terms, and agrees to give free connections, to all of its patrons connected

375

with the Evansville exchange with all farmers' lines in any of said counties so connected.

In case there should arise a disagreement between said party of the second part and the owners of any such farmer telephone line or lines, as to the terms and conditions upon which any such connection shall be made, as to hinder or delay the same, then such difference and disagreement shall be promptly submitted to an arbitration committee composed of three, one of whom shall be named by said party of the second part, one by the owner or owners of said farmer telephone line desiring connection, and the third to be agreed upon by the two thus selected, and the decision of a majority of said committee as to the terms and conditions upon which connection ought to be made shall be final and conclusive upon the parties concerned.

SECTION 14. As security for the performance of the conditions of this contract, the said party of the second part, immediately upon the ratification thereof, by the Common Council of the City of Evansville, and the approval thereof by the Mayor, shall execute and file with the Board of Public Works a bond, payable to the City of Evansville, Indiana, for the sum, of twenty thousand dollars, with good and sufficient surety to the satisfaction of said Board, which bond shall be conditioned for the faithful performance of said party of the second part, of each and every stipulation and agreement contained in this contract and for the carrying out of all the terms and conditions thereof during the entire period and term covered thereby. The said bond shall be renewed at the expiration of each period of five years during said term of years, and each bond to be in full force until the bond in renewal thereof is approved by the Board; and the said Board may require said bond to be renewed at any other time, when it deems the security thereon inadequate, or when such bond becomes impaired in the amount by reason of demands claims or otherwise.

376 SECTION 15. In case the party of the second part, its successors or assigns, shall violate any of the terms or obligations herein contained, then, in *in* that event a right of action for breach of contract shall immediately accrue upon said bond, as may be appropriate for any injury or damage arising out of such breach of contract. And, if the said party of the second party shall fail or refuse to furnish the bond provided for, in the preceding section, then its rights under this contract shall cease, and the franchise herein granted be forfeited, such forfeiture to be enforced in any Court of competent jurisdiction.

SECTION 16. The City of Evansville, reserves to itself all rights and powers which are now, or will hereafter be vested in its Common Council or other officers concerning the regulations of the use of its streets, alleys, avenues and public places to prevent the encumbering of the same, to regulate and protect sewers, to prohibit the digging into such streets, alleys, avenues and public places and other injury to the same, and also reserves the fullest right to exercise any and all of its police powers at any time, and nothing herein contained shall be so construed as to in any wise abridge any of such powers.

In witness whereof, the undersigned members of the Board of Public Works of the City of Evansville, Indiana, on behalf of said City have hereunto set their hands and seals; and the said Cumber-

land Telephone and Telegraph Company has caused this instrument to be signed, under its corporate name, by James E. Caldwell, as President, and to be attested by its Secretary, under its corporate seal, all done on the day and year above first written.

WM. H. KRIEPKE,  
BENJAMIN NEWMAN, SR.,  
CHRIS. WUNDERLICH,  
*Board of Public Works.*

[SEAL.]

CUMBERLAND TELEPHONE &  
TELEGRAPH CO.,

By JAMES E. CALDWELL, *President.*

Attest:

J. W. HUNTER, JR., *Secretary.*

377 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS, JAS. H. MALONE, MAYOR, AND OTHERS.

EXHIBIT "C" TO STIPULATION OF COUNSEL.

Filed June 3rd, 1908, Dan F. Elliotte, Clerk.

*Status of the Telephone Industry.*

The Status of the Telephone Industry to-day is shown approximately by the following statistics (1905).

*Bell Systems.*

Capitalization of Licensee-companies.....	\$400,000,000
Am. Tel. & Tel. Co. Stock.....	154,000,000
Am. Tel. & Tel. Co., Bonds.....	38,000,000
Am. Tel. & Tel. Co. Notes.....	20,000,000
Total.....	\$602,000,000
Number of Systems.....	44
Number of Main Exchanges.....	1,600
Number of Branch Offices.....	2,000
Number of Switchboards.....	4,000
Subscribers.....	1,800,000

Under twenty-five years of patent protection.

378 *Independent Systems.*

Invested Capital.....	\$250,000,000	
Number of Systems.....	5,000	Under eight years
Number of Public Exchanges.....	7,500	of established
Number of Switchboards.....	8,000	competition.
Subscribers to Exchange Service..	2,000,000	

*Why Bell Rates are High.*

Perhaps the main reason why Bell rates are high is that high rates are needed to pay dividends, and in the absence of competition *can be charged*, for the people must have telephones. The Bell companies have not only charged high rates, but

The reasons of have introduced blind systems of extortion, of pressure. such as measured service, party lines, and extra

charges for various accessories to the ordinary service. The main reason why the Bell rates cannot well be equitable to the public is as follows:

High Depreciation.

High Capitalization.

A pressure of High Cost of Equipment.

reasons. High Cost of Maintenance.

Royalties to Parent company.

Lack of Interest on the part of employees.

1. Depreciation. Frequent rebuilding has been necessary, owing partly to the growth of the business for which the Bell companies generally failed to provide and partly to the improvements inaugurated in the equipment and construction.

379 "For nearly thirty years the Bell companies have been discarding switchboards and telephones. Improvement has followed improvement so rapidly that switchboards on which the

varnish was hardly dry have gone to the scrap-

heap to make way for the newer and better pattern. This constant replacing of one of the most important parts of the plant often costs money

in amounts represented in seven figures." The switchboards in use to-day have cost the Bell Companies about \$40,000,000. "They took the place of the switchboards of yesterday, because somebody thought of a better way of doing the work, and when some other improvement is made the switchboards of to-day will be discarded to make room for those of to-morrow."

In other words, these manual switchboards always have a limited capacity, and when outgrown or out-of-date (and they are usually out-of-date when outgrown) must be discarded to make place for equipment of still larger capacity and further improved. And this enormous expense due to progress, growth, and improvement has made a heavy depreciation account necessary.

"2. Capitalization: As every one knows, much of the original

Too small a beginning. stock of the parent Bell Company sold at a ridiculously low price—as low as \$2 per share or less—and that the present capital of the parent company (American Telephone & Telegraph Company) is made up of the original stock doubled over and over and over again; \$100 worth of Bell stock purchased in the early days has since reached a valuation of \$25,000 or more.

Thus the present capital of the Bell Company is many times larger than the actual capital invested.

380 In the organization of the Bell licensee companies it was the custom to charge 51 per cent. of more of the new company's capital for the license (or privilege to do business).

For example, it is understood that the New England Telephone & Telegraph Company, out of the original capital of about \$11,000,000, paid \$6,000,000 of stock to the parent Bell Company. Then, to

raise money for construction of plants, the New England Company sold stock at \$25 per share (25 per cent. of its par value). Its present value

Wheels within a wheel. has been made out of the very large profits of the business and its 6 per cent dividend represents an earning of several times 6 per cent on the actual capital invested.

3. Cost of Equipment: The Bell licensee companies are further obliged by perpetual contract to purchase their equipment of a branch of the parent company (the Western Electric Company of Chicago and New York) at very high prices—much higher than the same class of equipment costs elsewhere.

4. Maintenance: Owing to the fact that the Bell plants in the early days were necessarily crudely built and badly engineered, they have had to be rebuilt in part from time to time in order to keep pace, to a certain extent, with the demands of the service. This has resulted in making patchwork of all exchanges that have not been entirely rebuilt.

The cost of "patchwork" policy. In the early days iron wire was used, strung entirely overhead on poles. City ordinances have from time to time compelled the putting of wires underground in cables. This has been done in part throughout the country, but not entirely and the process is still under way. Several different kinds of transmitters have been 381 adopted, then replaced by others. All of this old plant which is still in use means a heavy maintenance charge, and its replacement means very heavy expense which, of course, ought to be charged to depreciation.

A still further reason for the high maintenance charges may be explained by the fact that there has developed in the operation of such a huge system an amount of "red tape"

Red tape as a stumbling block. which is both displeasing as it comes in contact with the public, and expensive to the company itself, for it stifles and discourages individual effort, ambition, and progress.

5. Royalties: The Bell licensee companies must pay royalties



(or a percentage of gross earnings) on expired patents (by perpetual contracts) which, for the transmitter and receiver

Paying the price was not enough. alone amount to \$2 to \$3 and upwards per year, while the market value of equally good instruments is only about \$3 for outright purchase.

6. Employees: The large number of able engineers and telephone men who have left the Bell companies and cast their lot energetically and enthusiastically with the Independent companies indicates the internal dissatisfaction in the ranks of Bell employees, which always reduces their efficiency and means increase of expense.

A further reason why rates are kept high (where they can be) is, that competition in hundred- of cities and towns

War rates as weapons of suppression. has led the Bell companies to make "war rates" which are extraordinarily low and unprofitable, so that the deficiency must be made up from the monopoly districts.

These conditions show why the Bell companies must make heavy charges for depreciation, maintenance, royalties expenses, and dividends.

With these facts in view no argument is necessary to show that the Independent companies—Independent of Bell contracts, Bell patents, Bell costs, Bell Royalties, Bell red tape, Bell ruts, war rates, and, if they please, independent of over-capitalization—can serve the public at reasonable rates with a fair profit.

382

### *High Earnings of Independents.*

(Editorial from American Telephone Journal.)

Paying investments are the rule, not the exception. "In meeting the press attacks of the Bell there is a feature in telephone competition that in the past has not received the attention it should. This is the *high average of earnings* shown by the

Independents and the fact that, despite the newness of the business, only a few of those who have embarked in the field have come to grief financially. In this respect *the record of Independent development is unequalled by any other industry* organized in the United States.

'During the last five years, bank failures have outnumbered several times those of telephone companies. There are about 6,000 Independent companies. The information bureaus established by the Bell companies for that purpose have compiled the seven years' record of Independent failures, and the list frequently published by the Bell shows the number to be only a score.

"In view of the failure of the Michigan Bell Company we give below the list of the six largest Independent companies operating in Michigan, and especially is this appropriate, inasmuch as the first Independent exchange in the United States having over 600 telephones in operation was in Michigan (1896).

"The said companies mentioned below operate more than one-

half the Independent telephones in Michigan and have paid regular cash dividends as follows:

	Dividend.	Term paid.
Citizens' Telephone Co. Grand Rapids...	2% quarterly	7 years
Valley Telephone Co. Saginaw.....	2% quarterly	5½ years
In proof of which. Union Telephone Co., Owasso.....	2% quarterly	5 years
Citizens' Telephone Co. Muskegon.....	4% semi-an.	5 years
Twin City Telephone Co. Ben Harbor....	4% semi-an.	5 years
Adrian Telephone Co. Adrian.....	4% semi-an.	5 years

“No Independent Company has failed in Michigan.”

383 My experience in the telephone business has been confined to organization and operation of the Rochester Telephone Company, and I can tell you little that is not currently published outside of this immediate field.

In competition with the Bell company here, the strife on our part has not been to secure the greater number of telephones, but to give the best possible quality of service, believing, what has proven to be true that the public would loyally support a company making honest efforts to give prompt, courteous, and efficient service from all departments.

Since opening our exchange we have never made aggressive canvassing for contracts. At no time have we had more than one contracting agent, and he has been kept busy following up inquiries and responding to calls for a representative of the company, and the increase in orders for telephones have come as rapidly as we could promptly and properly fill them and easily provide capital for extensions.

For three years we have paid a dividend on our stock. The first year 4 per cent, the last twelve months. Stock doubled in our stock. The first year 4 per cent, the last two years 5 per cent, and we have a surplus equal to more than 25 per cent. of our common stock. Our common stock is in active demand at more than double what it was offered for one year ago.

384

### *Hot Fight in Michigan.*

In Michigan the Independents have made tremendous inroads upon the profits of the monopoly. E. B. Fisher, Secretary of the Citizen's Telephone Company, of Grand Rapids, says:

“Before the Independent service was established the Bell rates were \$50. for business and \$40. for residence telephones in a general way for a mile from the center of the city. Beyond the mile they advanced, so that at one time there were rates as high as \$100 for business and \$65. for residence telephones.

Up-to-date service. Just after the Independent franchise was granted Bell rates were fixed at \$48. for business and \$36. for residence service, with some reduction for distances beyond the mile. At that time the Bell company had about 1,500 telephones in operation.

"Independent rates were fixed at \$36 and \$24 by their franchise and are the rates charged to-day for business and residence service. After competition began the Bell company at one time cut its rate to

Competition reduces rates. \$24. for business telephones, and for nearly two years it gave free residence service to subscribers. Its present rates are \$30.00 and \$18.

The Citizens Company, with the latest up-to-date automatic service, has 6,000 telephones in use at \$36. and \$24, and the Bell Company considerably less than half that number at the rates named. Long Distance rates are now fifty to sixty per cent. what they were before competition was established. In 1896, when this company first began business the Bell Company had less than 14,000 telephones in the State, both peninsulas. The independents now have somewhat more than 50,000 and the Bell Company probably about the same number."

385 In Grand Rapids both companies have a five per cent. call rate for all pay stations. The Independent Citizens Company for the fiscal year ending June 30, 1904, showed undivided profits above all expenses of \$49,962.94.

Concerning the telephone business as a field for investment we take the following from an article by Le Roy W. Stanton, the well known electrical engineer:

"For a permanent investment I do not think that the telephone has many equals in the industrial world to-day. For instance, the street railway. You have rolling-stock on

Hard times do not hit the telephone. which there is heavy wear and tear; you have the track to keep up, washouts to repair, bridges to maintain, large coal bills to pay, power-house to keep up, expenses of employees, and much greater danger risks. You will note that these features are almost totally eliminated in a telephone investment. You have an investment that is not affected by hard times; that cannot very well be destroyed by fire, as it is scattered over a large amount of territory; no expensive salesmen on the road; you are not compelled to keep large quantities of raw material on hand, nor large quantities of manufactured material on which to pay interest, taxes, insurance etc. The prices do not fluctuate as in most other lines of business; the rates are on the rise rather than on the decline."

386

### *Concerning Telephone Dividends.*

Editorial from the "Tel-phone Magazine."

No better proof of the stability of the Independent movement, or that Independent telephone securities are a safe and profitable investment, could be adduced than the dividend reports that are daily being made by Independent companies in various parts of the country. Many of these companies have been in operation from six to ten years, and also most without exception have paid dividends from the first, none below 4 per cent., the majority ranging from 7 to 10,

and in not a few instances reaching as high as 15, 20 and even up to 33½ per cent. And it must be remembered in this connection that these dividends are being paid by Independent companies in communities where in nearly every instance competition is encountered, and where the rates of the newer company in the field are considerably less than were the rates of the Bell Company when it had a monopoly of the situation. This goes to prove two things i. e. that competition lowers rates and results in manifold benefit to the telephone-using public, and also that a telephone company can be operated at a profit when the rates charged are considerably less than the old Bell rates.

As indubitable evidence of the dividend-paying powers of Independent companies the Telephone Magazine refers its readers to the financial department of this paper, where is shown a list of more than two dozen companies that recently have declared dividends; and this, by the way, is but a small per cent of the number  
387 that have since the first of the year declared and paid dividends ranging from 6 to 20 per cent. A glance at the following should convince even the most skeptical that Independent telephony is a paying proposition:

Hamilton (Mich.) Mutual Telephone Company, 33½ per cent.

West Virginia and Western Telephone Company, Parkersburg, W. Va., 20 per cent.

Tri-State Telephone Company, Austin, Minn. 14 per cent.

Muskegon (Mich.) Citizens' Telephone Company, 8 per cent.

Missaukee Telephone Company, Lake City, Mich. 14 per cent.

York County (Neb.) Independent Telephone Company, 10 per cent.

Georgia Telephone & Telegraph Company pays 6 per cent dividends.

Citizens Telephone Company, of Laconia N. H., pays 6 per cent.

Crawford County Telephone Company, of Iowa, pays 10 per cent.

Ontario Telephone Company, of Oswego, N. Y. pays 6 per cent.

Clifton Park Telephone Company, of Round Lake, N. Y., pays 8 per cent.

Mutual Telephone Company of West Stockbridge, Mass., pays 7 per cent.

Citizens Telephone Company, or Battle Creek, Mich., pays 4 per cent semi-annually.

Ottawa County Telephone Company, of Ohio, pays 3½ per cent semi-annually.

Texas & Pacific Telephone Company, pays 12 per cent.

Huntington Telephone Company, West Virginia, pays 5 per cent.

Connersville Telephone Company, Indiana, pays 8 per cent.

Home telephone Company, Chillicothe, Ohio, pays 10 per cent.

Black River Telephone Co., Ohio pays 6 per cent.

388 York County Telephone Company, pays 5 per cent, semi-annually.

Benzie County Telephone Company, Benzonia, Mich., pays 8 per cent annually.

The Union Telephone Company of California, Pennsylvania, recently issued checks for its fourth quarterly dividend of 1904. The

Union Tele-  
phone Company,  
California, Pa.

dividend was 2½ per cent, making 10 per cent. paid to stockholders for the year. The company's authorized capital at the start was \$10,000, which was increased by vote of the stockholders in April last to \$15,000, and again increased on Dec. 1, 1904 to \$20,000.

Kansas City  
Home Telephone  
Company.

The following appeared in a recent issue of the St. Louis Post-Dispatch: "The listing committee of the local Stock Exchange has admitted to the trading \$2,000,000 of the 5 per cent. bonds of the Kansas City Home Telephone Company, dated, Jan. 2, 1903, and due Jan. 2, 1923. These bonds are considered an excellent addition to the local trading list, as this company is in excellent financial condition at the present time."

Red River Val-  
ley Telephone  
Company.

The Red River Valley Telephone Company recently declared a dividend of twelve (12) per cent., and transferred a nice surplus to the reserve fund. The company has a paid up capital of \$65,000. The company has 1,050 telephones in use among farmers and business men in Grank Forks, Traill, Steele, and Nelson Counties, N. D., and Polk County, Minn.

Belmont Tele-  
phone Company.

At the recent annual meeting of the stockholders of the Belmont Telephone Company, or Bridgeport, Ohio, a dividend of 33 1/3 per cent. was declared, and the capital stock of the company increased from \$75,000 to \$100,000. Aside from this remarkable dividend the company is constantly increasing its system and extending its lines.

389

Wabash Home  
Telephone Co.

The Wabash (Ind.) Home Telephone Company has increased its capital stock from \$20,000 to \$50,000, and put in a \$10,000 switchboard. The company has about \$70,000 invested in its plant; its stock and bonds are all owned in Wabash, and it is paying in addition to the interest on its \$25,000 bond issue, 6 per cent. on its stock.

Ottawa, Tele-  
phone Co.

The New Ottawa Telephone Company of Elmore, Ia., recently issued its annual statement showing its gross receipts for 1904, up to November 1, as \$23,973.67, a gain of more than \$3,000 over the same period for 1903. It also distributed \$8,680 among the stockholders, the dividend rate for the year being 7 per cent.

Thirty divi-  
dends paid.

At the regular monthly meeting of the Citizens Telephone Company of Grand Rapids, Mich., the thirtieth consecutive quarterly dividend of 2 per cent. was declared, payable January 20. The directors approved the purchase of the Marion Mich., exchange.

- Union Telephone Co., Alma, Mich. The Union Telephone Company, of Alma, Mich., has paid its eleventh semi-annual dividend. During the five and a half years since first organized this company has never failed to pay a 4 per cent. semi-annual dividend.
- Calhoun County Telephone Company. At the Annual meeting of the Calhoun County Telephone Company, recently held at Jerseyville, Ill., a dividend of 9 per cent. was declared on preferred stock, and 6 per cent. on common stock.
- 390 Twin City Telephone Co. The board of directors of the Twin City Telephone Company of Minneapolis has declared a dividend of 5 per cent. per annum on the common stock of the company.
- Galva Telephone Co. Six per cent. in cash on the capital stock, and 14 per cent. in the form of a stock dividend was declared recently by the Galva (Ia.) Telephone Company on the business of the year.
- Maquoketa Telephone Company. The Maquoketa (Ia.) Telephone Company has declared a 10 per cent. dividend on its preferred stock, and a 4 per cent. on its common stock for the last half of 1904.
- Mutual Telephone Company. The Mutual Telephone Company of Shenandoah, Ia., recently distributed about \$3,000 among its stockholders, being the regular semi-annual dividend of 5 per cent.
- Daleville Telephone Company. The Daleville (Ind.) Telephone Company recently declared a dividend of 4 per cent. on all stock issued by said company.
- Shelby Telephone Company. The Shelby (Ia.) Independent Telephone Company, at its recent annual meeting, declared a dividend of 8 per cent.
- Marquette County Telephone Company. The directors of the Marquette County, (Mich.) Telephone Company recently declared a dividend of 10 per cent.
- Oxford Telephone Company. The Oxford, (Ohio) Telephone Company recently declared a quarterly dividend of 1½ per cent.
- LaFayette Telephone Co. The Lafayette (Ind.) Telephone Company has declared a quarterly dividend of 1½ per cent.
- 391 Slater Telephone Co. The Slater (Ia.) Telephone Company has just declared a dividend of 8 per cent.
- Stewart Telephone Company. The Stewart (Ga.) Telephone Company has declared a dividend of 20 per cent.

From figures on hand, and constantly coming in this office, we might draw any quantity of material similar to the foregoing, and go on and give column after column of companies that are paying good healthy dividends, and in some cases enormous rates of interest on the investment, but enough is shown here to conclusively prove that where correct business principles are introduced in the management of a company it can be made to handsomely pay the investor.

392

## EXHIBIT D TO STIPULATION OF COUNSEL.

Filed June 3rd, 1908. Dan F. Elliotte, Clerk.

New Orleans Board of Trade, Ltd.

Telephone Conditions in New Orleans, La.

Being a Report Presented by a Special Committee of the New Orleans Board of Trade, Approved April 8th, 1908.

New Orleans, 1908.

393 *Order of the Railroad Commission of Louisiana.*

The Railroad Commission of Louisiana in the Matter of the Joint Petition of the Cumberland Telephone and Telegraph Company and the New Orleans Board of Trade.

Appearances—W. L. Granberry, for the Cumberland Telephone and Telegraph Company; C. H. Ellis, for the New Orleans Board of Trade.

The joint petition filed in this proceeding sets forth the fact that for some months the telephone service in the City of New Orleans has been under investigation by the New Orleans Board of Trade, and as a result of that investigation a tentative agreement was reached between the New Orleans Board of Trade and the Cumberland Telephone and Telegraph Company by which certain rates for telephone exchange service in the City of New Orleans have been agreed upon, and are submitted to the commission for its consideration and approval.

The record in the case shows that the New Orleans Board of Trade, representing a large number of telephone users in the City of New Orleans, some months ago began a thorough investigation into the telephone service as rendered in the City of New Orleans, the cost of the same as compared with other cities in the United States and the character of the service as furnished by the Cumberland Telephone and Telegraph Company. A printed report of the results of this investigation was submitted to the Board of Trade, and received the unqualified endorsement of that body. In this report the rates which are now submitted to the commission for its approval were recommended by the Board of Trade to the Cumberland Telephone and Telegraph Company for its consideration and the said Cumberland Telephone and Telegraph Company acquiesced in the recommendations of the Board of Trade and presented the rates thus agreed upon to this commission.

The investigation made by the Board of Trade appears to the commission to have been conducted fairly and without prejudice, and was most thorough and complete. The men composing the committee of investigation were men of unquestioned integrity and rank among the most prosperous and successful business men in the



City of New Orleans. They have been deeply interested in the question of securing for the City of New Orleans the best possible telephone service at the lowest compensatory rates. This commission has watched with great interest their proceedings, and after examining carefully the results of their investigation as set forth in their report, feels that they have reached a conclusion which is decidedly in the interest of improved telephone service in their city. Their entire report verifies the findings of this commission in its own investigations into the quality, character and cost of telephone exchange service in the City of New Orleans, as compared with the service in cities of the United States of similar size.

395-397 It is useless here for the commission to review at length the findings of the Board of Trade, since the results of the investigation have been given wide publicity and printed for the purpose of general distribution.

The premises considered and with the belief that the rates which are now proposed by the Cumberland Telephone and Telegraph Company and the New Orleans Board of Trade for exchange service in the City of New Orleans are worthy of a fair trial, the commission has concluded that it will authorize the proposed rates for the period of one year, beginning May 1, 1908.

It is also further ordered that on and after April 1, 1909, the party line, business service, shall be discontinued and business houses shall be served at their option upon any of the classes of service enumerated under "business telephones," as set forth in this order.

It is also further ordered that on and after April 1, 1909, the four and six party line residence service shall be discontinued in the City of New Orleans, and parties desiring residence telephones shall be served at their option at any of the rates enumerated under "residence telephones" as set forth in this order.

All orders, authorities or rates in conflict herewith are hereby cancelled.

By order of the commission, at Baton Rouge, La., April 29, 1908.

C. L. DE FUENTES, *Chairman*,  
OVERTON CADE,  
J. J. MEREDITH, *Commissioners*.

C. M. BARROW, *Secretary*.

398 Resolutions of the Board of Directors of the New Orleans Board of Trade, Ltd., approving unanimously the Report of the Special Telephone Committee and authorizing the execution of a Contract with the Cumberland Telephone & Telegraph Company.

Whereas, the Board of Directors, on the 13th day of November, 1907, appointed a Special Committee to inquire into telephone conditions in New Orleans, composed of Messrs. C. H. Ellis, Henry B. Schreiber, Chas. Dittmann, A. F. Leonhardt, E. F. Kohnke, S. Locke Breaux, Gus. Lehmann, Sam Blum, Jas. W. Poreh and Louis Scherek; and

Whereas, the Board of Directors assembled in regular monthly session this 8th day of April, 1908, have given due consideration to

the Report of the Special Committee presented to them at a special session on the 20th day of March, 1908; and

Whereas, the Board of Directors appreciate the absolute necessity of carrying out the recommendations of the Special Committee, and are fully alive to the imperative need of application of business principles as essential to the proper regulation of public service corporations and to the continued welfare of the City; and

Whereas, the Board of Directors consider it a matter of paramount importance that Corporations doing business in this City shall

399 receive a fair return upon their investments; therefore be it

Resolved that the unanimous Report of the Special Telephone Committee be approved by the Board of Directors, and that the President of the New Orleans Board of Trade be and is hereby authorized to sign the proposed agreement with the Cumberland Telephone & Telegraph Company; and be it further

Resolved that the President be and is hereby authorized to appoint a permanent Telephone Committee, consisting of not less than five members selected from the Board of Directors (three of whom shall constitute a quorum), whose duty it shall be to look after all telephone matters, and the requirement of a faithful performance of the agreement entered into with the Cumberland Telephone & Telegraph Company; and be it further

Resolved that the thanks of the New Orleans Board of Trade be extended to the Special Committee, and to Mr. H. N. Hall, their Special Commissioner, as well as to all parties who, through courtesy and personal efforts, made it possible for the Special Committee to obtain the valuable information contained in the Report; and be it further

Resolved that this Report be printed in full and communicated to His Honor Mayor Behrman, and the Honorable City Council, to the various parties interested, and to the members and correspondents of the Board of Trade.

By order of

THE BOARD OF DIRECTORS.  
HENRY B. SCHREIBER, *President*.

H. S. HERRING, *Secretary*.

400 *Telephone Committee of the New Orleans Board of Trade.*

Crawford H. Ellis, Chairman; Manager of the United Fruit Company; First Vice-President of the Board of Trade; First Vice-President of the Progressive Union; a director of the Whitney-Central National Bank; a director of the Interstate Trust & Banking Company.

Henry B. Schreiber, of H. B. Schreiber & Bro. Grain merchants; President of the Board of Trade; a director of the Metropolitan Bank.

Charles Dittmann, Coffee merchant; Second Vice-President of the Board of Trade, Chairman of the Finance Committee; a director of the Orleans Bank.

A. F. Leonhardt, of A. F. Leonhardt & Co., Grain Merchants; Third Vice-President of the Board of Trade; Chairman of the Grain Committee.

E. F. Kohnke, Flour merchant; Ex-President of the Board of Trade; Chairman of the Executive Committee.

S. Locke Breaux, Rice and Cotton merchant; Ex-President of the Board of Trade, Chairman of the Rice and Rice Freight Committee.

401 Gus. Lehmann, of A. Lehmann & Co., Wholesale Dry Goods; Chairman of the Committee on Legislation of the Board of Trade.

Sam Blum, Commission merchant; Chairman of the Municipal Affairs Committee of the Board of Trade; President of the Touro Infirmary.

James W. Porch, of Lukens Iron and Steel Works; Chairman of the Freight and Transportation Committee of the Board of Trade; President pro-tem of the Belt Railroad Commission.

Louis Scherck, of H. T. Cottam & Co., Wholesale grocers; Vice-Chairman of the Freight and Transportation Committee of the Board of Trade.

H. S. HERRING, *Secretary*.

HENRY NOBLE HALL,

*Special Commissioner.*

402

*Regulation of Rates.*

It is our opinion that no individual Committee or Council can determine now what will be a fair rate for telephone service five years hence, or even within a much shorter time; therefore, in the matter of rates, we have taken this into consideration, and do not deem it proper to recommend or endorse any rates for a longer period than one year, from April 1st, 1908, to March 31st, 1909, at which time, it can be determined whether, or not, these rates are fair to  
403 the public and the Telephone Company, and give the latter a reasonable return, (not exceeding ten per cent), on its investment. Capital does not seek investment unless its object has for its purpose a fair return; therefore, it is but just that the telephone rates be re-adjusted at intervals to meet conditions that may arise, from the improvements which are constantly taking place from time to time.

The ideal system of charges for telephone service is no doubt, the measured rate plan, but the flat rate, to which the public is accustomed, is already in existence here, and, taking into consideration the primitive method employed for recording calls for measured rates, it would be undesirable to eliminate the flat rate service at the present juncture, and we, therefore, recommend that the public be at liberty to choose between the different classes of service and rates now suggested by our Committee, which offer a wide choice to prospective patrons, who should have no difficulty in selecting a class of service to meet their individual needs. To the business man, whose use for the telephone does not justify the payment of the flat rate of \$10.00 net per month, one of the measured service or Pay Station rates will be suitable.

We, therefore, recommend the following schedule of rates for the City of New Orleans, covering the period from April 1st, 1908, to March 31st, 1909:—

Business Telephones.

Flat rate, unlimited service—first direct line.....	\$10.50
Flat rate, unlimited service—second direct line, same premises .....	8.50
Flat rate, unlimited service—third or over direct line, same premises .....	7.50

404 *Agreement With the Cumberland Telephone & Telegraph Company.*

The Cumberland Telephone & Telegraph Company, incorporated under the laws of the State of Kentucky, with headquarters at Nashville, Tenn., and doing business in the City of New Orleans, Louisiana, hereinafter called the "Cumberland Company", and the New Orleans Board of Trade, Limited, incorporated under the laws of the State of Louisiana, hereinafter called the "Board of Trade", having a desire to bring about a settlement of the telephone situation in the City of New Orleans, and obtain for the public the very best service and development at the lowest rates possible, and at the same time, do no injustice to the capital invested in the telephone plant in the City of New Orleans; have entered into the following agreement, which agreement is to remain in force for a period of one year, from April 1st, 1908, to March 31st, 1909, and to be continued from year to year, until March 31st, 1913, while and so long as the New Orleans Board of Trade feel satisfied that it is advisable to do so, it being understood that, in the absence of any notification of cancellation on the part of either party thirty (30) days prior to the expiration of each year's period, said agreement is continued for the following year:

First. The "Cumberland Company" hereby agrees to keep a separate set of books for their New Orleans business, so as not to  
405 confuse said business with their general business, and to publish, at the end of every quarter, in one or more of the morning and evening New Orleans newspapers, a full and complete statement of the gross earnings and expenses of their business in the City of New Orleans, in such a manner as to show the actual net earnings on their New Orleans investment, which statement shall be sworn to by the President and the Secretary of the "Cumberland Company", and shall include, in the gross earnings, all monies received for Long Distance calls originating in the City of New Orleans, and that the "Board of Trade" shall, at any time, have the right to appoint an expert to examine the books and accounts of the "Cumberland Company", for the purpose of verifying any and all statements, and that they will be furnished with any statements requested, at any time, irrespective of the regular quarterly publication.

Second. The "Cumberland Company" hereby agrees that it will use its best endeavors to bring about an extension of their business, with the view of adding not less than 250 new telephones per month in the City of New Orleans, to their present number, in order that by March 31st, 1909, they will have added not less than 3,000 new telephones, bringing their total number up to about 17,000; and that they will issue, not less than every three months, a full and complete Telephone Directory, embracing a full and complete list of all subscribers, in alphabetical order, and following the alphabetical list, publish a numerical list of all subscribers in the City of New Orleans; and they also agree to publish a full and complete list of all classes of service and rates, on the first pages of their telephone directory, in all issues, and to, furthermore, publish a full and complete list of all classes of service and rates on the first of 406 each month, in one or more of the morning and evening New Orleans newspapers.

Third. The "Cumberland Company" hereby agrees that, during the term of this agreement, they will furnish, upon demand, telephone service of any and all classes or kinds mentioned herein below, in the City of New Orleans, without discrimination, and at the same price to all persons, firms and corporations who shall elect to take or use any of such classes or kinds of service, and shall not charge its present or future subscribers, within the City of New Orleans, rates for telephone service in excess of the following rates, it being understood that all contracts now in existence between the "Cumberland Company" and their subscribers are hereby excepted, with the exception of the complimentary telephones now in existence, all of which the Company agrees to abolish, excluding those called for under their Franchise:

#### Business Telephones.

Flat rate, unlimited service, first direct line.....	\$10.50
Flat rate, unlimited service, second direct line, same premises .....	8.50
Flat rate, unlimited service, third or over direct line, same premises .....	7.50
Flat rate, limited service, direct line, all incoming calls free; 250 outgoing calls per quarter free; excess calls 2c. each..	5.50
Measured rate, direct line; all incoming calls free; all outgoing calls 2c. each.....	3.50
Extension Sets.....	1.50

#### Professional Telephones.

(Embraces Physicians, Lawyers, Architects, Engineers, Schools and Convents with School Departments:)

407 Flat rate, unlimited service, direct line.....	\$7.50
Flat rate, limited service, direct line; all incoming calls free; 250 outgoing calls per quarter free; excess calls 2c. each.....	5.00
Measured rate, direct line; all incoming calls free; all outgoing calls 2c. each.....	3.00
Extension Sets.....	1.50

## Residence Telephones.

Flat rate, unlimited service, direct line.....	\$4.50
Flat rate, limited service, direct line; all incoming calls free; 250 outgoing calls per quarter free; excess calls 2c. each.....	4.00
Flat rate, unlimited service, 2 Party Line.....	3.50
Measured rate, direct line; all incoming calls free; all out- going calls 2c. each.....	2.50
Extension Sets (on direct lines only).....	1.50

## Special Telephones.

(Quoted to Clergymen, Churches and strictly Charitable Institu-  
tions:)

Flat rate, unlimited, direct line.....	\$3.50
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## Guarantee Pay Stations.

Direct Line only; 5c. for each call. Monthly Guarantee....	\$6.50
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Each Station to be equipped with a coin receiving device; all in-  
coming calls free. If receipts do not equal guarantee, subscriber to  
make up difference. 50% of excess above guarantee to be returned  
to the subscriber.

NOTE.—All the above rates subject to a discount of 50cts. per  
month for each telephone, if paid quarterly, in advance.

408

*Private Branch Exchange Service.*

## Plan "A"—Unlimited Service.

Switch-board equipped for 20 lines or less, per mo.....	\$5.50
Switch-board equipped for 21 lines or more, per mo.....	10.50
Unlimited Trunk Lines, each, per mo.....	15.50
Telephone instruments in the same building with the switch- board, each, per mo.....	1.50

Telephone instruments located outside of the building in which  
the switch-board is installed will be charged for as follows:

Within one mile, circuit mileage, of the Private Branch Exchange switch-board, each instrument, per month....	\$6.50
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If the outside instrument is located beyond one mile, circuit mile-  
age, of the said Private Branch Exchange switch-board, \$7.50 per  
annum will be added to the said rate of \$6.50, for each additional  
one-fourth mile, or fraction thereof.

The minimum rate for outside telephones located in Algiers or  
Gretna, La., will be \$13.50 per month each, provided such telephones  
are not more than one mile, circuit mileage, from the Branch Ex-  
change switch-board to which they are directly connected.

If such telephones are beyond one mile, circuit mileage, of the  
Private Branch Exchange switch-board to which they are directly  
connected, \$7.50 per annum for each additional one-fourth mile, or



fraction thereof, circuit mileage, will be added to the aforesaid minimum rate of \$13.50 per month.

Extension Sets located in the same building with the initial inside or outside telephones will be furnished at the rate of.....per month each.. \$1.50

The style of instrument which the Telephone Company will furnish for use in connection with Private Branch Exchanges, may, at the option of the subscriber, be either wall or desk.

The minimum equipment which will be furnished will consist of switch-board, operator's seat, necessary battery connections, two unlimited Trunk Lines and three telephones located in the same building with the switch-board.

Private Branch Exchange subscribers, on this Plan, that is Plan "A", will be required to take and pay at the aforesaid rate therefor, one unlimited talking Trunk Line for each five or less telephones (counting Operator's set as a Telephone), directly connected to the Private Branch Exchange switch-board.

If the aforesaid rates are paid quarterly in advance, at the office of the Telephone Company, by the tenth day of the first month in each quarter, a discount of 50c. per month will be allowed from each of the above-mentioned rates, except that in the case of outside telephones, the wire mileage charged is net, and the discount will only be allowed from the rate quoted for the telephones.

#### Plan "B"—Limited Service.

Minimum equipment, including switch-board, Operator's set, three telephones located in same building with switch-board, two talking Trunk Lines, and 166 $\frac{2}{3}$  outward calls per month, per month—\$19.00—less \$3.00 if paid quarterly, in advance, at the office of the Telephone Company, (Excess calls 2c. each)—by the tenth day of the first month in each quarter.

An outward local call, as herein referred to, is a call originating at some telephone directly connected to the Private Branch Exchange switch-board, and destined to some telephone embraced in the New Orleans Exchange service of the Telephone Co., and constitutes a conversation of five minutes or less duration.

In-bound calls, calls for telephones which are not answered, calls between telephones directly connected to the Private Branch Exchange switch-board, and calls to the Toll or Long Distance board of the Telephone Co., are free.

Each talking Trunk Line furnished in addition to the first talking Trunk Line will be charged for at the rate of \$66.00 per annum, and will include, without additional charge, 1,000 outward calls per annum.

The said rate of \$66.00 per annum for additional Trunk Lines may be paid quarterly, in advance, at the office of the Telephone Company, in which event, a discount of \$1.50 per quarter will be allowed.



Telephone instruments located outside of the building in which the switch-board is installed, will be charged for at the rates provided in Plan "A," for such outside stations.

All excess messages are to be paid for each and every month, at the office of the Telephone Co., by the tenth day of the month for the month next preceding.

Plan "C"—Measured Service.

The subscriber may, at his option, own and maintain, at his own expense, his Private Branch Exchange equipment, in so far as switch-board, instruments, other apparatus, wiring, etc., are concerned, and, in this event, the Telephone Company will make connection therewith, provided the equipment installed is substantial and efficient, and is installed according to approved methods and specifications, upon the following terms:

411 The Telephone Co. will furnish not less than two talking Trunk Lines, at the rate of \$66.00 per annum each, including 1,000 outward local calls per annum with each line. If payments are made quarterly, in advance, at the office of the Telephone Co., by the tenth day of the first month in each quarter, a discount of \$1.50 per quarter will be allowed from said Trunk Line rate.

Excess calls will be charged for at Two Cents (2c.) per call, and payments therefor shall be made as in the case of Plan "B."

Additional Trunk Lines, including 1,000 outward local calls per annum, will be furnished at \$66.00 per annum each. If payments are made quarterly, in advance, at the office of the Telephone Co., by the tenth day of the first month in each quarter, a discount of \$1.50 per quarter will be allowed from said Trunk Line rate.

Fourth. The "Cumberland Company" agrees that it will, at once, make application to the State Railroad Commission, and the "Board of Trade" hereby agrees to join them in said petition, asking that all service and rates for the City of New Orleans heretofore authorized by the Commissioner be cancelled, and that the rates mentioned in Paragraph Third of this agreement be adopted in lieu thereof, and, immediately upon the favorable consideration of said application, the "Cumberland Company" agrees that it will not accept any orders for Party Lines, with the exception of the two-party-line telephones for residences, and that prior to March 31st, 1909, it will substitute other classes of service for all Party Lines now in use under Business heading, also under the heading of Professional Service, as well as for all Party Lines in excess of two-party-line telephones under the heading of Residence Service.

412 Fifth. The "Cumberland Company" hereby agrees that it will, at no time during the period this contract is in force, make any application to the State Railroad Commission, embracing any changes in the classes of its service or rates governing the City of New Orleans, hereinabove mentioned, without said application bears the approval and endorsement of the "Board of Trade."

Sixth. In consideration of the performance of all of the stipulations herein contained, the "Board of Trade" hereby agrees that,

while and so long as the "Cumberland Company" acts in good faith and duly observes this agreement, it will give its full co-operation to the "Cumberland Company," in order that they may fully develop their business and further their interests in the City of New Orleans and surrounding country.

In witness whereof, the "Cumberland Company" has caused this instrument to be signed by its President, and attested by its Secretary, and the "Board of Trade" has likewise caused the same to be signed by its President and attested by its Secretary, under their respective corporate seals, in Duplicate, this, the Ninth day of April, 1908.

**CUMBERLAND TELEPHONE &  
TELEGRAPH CO.,**

By JAMES E. CALDWELL, *President.*

Attest:

JOHN W. HUNTER, JR., *Secretary.*

**NEW ORLEANS BOARD OF  
TRADE, LIMITED.**

By HENRY B. SCHREIBER,

*President.*

Attest:

H. S. HERRING, *Secretary.*

413-414

*Mr. Hall's Report.*

NEW ORLEANS, Jan. 14th, 1908.

To Crawford H. Ellis, Esq., Chairman, and Members of the Telephone Committee of the New Orleans Board of Trade, Ltd.

GENTLEMEN: Pursuant to your instructions, I have diligently inquired into and made careful investigation of: First, telephone conditions in New Orleans as compared with other cities in the United States; Second, the rates charged and service given by the Cumberland Telephone & Telegraph Company to its patrons here; and, Third, the advisability of a dual system of telephones in New Orleans. I beg leave to hand you my report:

I deem it fair to all parties to state that when I entered upon this investigation I was firmly convinced, in my own mind, that at the present stage of political development in this country, it is to the best interest and advantage of large cities that public services, especially those involving the use and tearing up of the streets, be furnished by private enterprise controlled and regulated by municipal authority.

Throughout my inquiry, I have approached each and every problem in a spirit of absolute impartiality and fair play: I have striven to mete out even-handed justice to the various conflicting interests concerned. In gathering the facts, I have labored to get at the Truth, and, to that end have employed whatsoever of ability I possess, and the experience gained in sixteen years of newspaper work. Starting without any expert knowledge of Telephony, hampered  
415 neither by traditions nor preconceived ideas, I endeavored to view every question with an unbiased mind, and believe

that the conclusions at which I have arrived will stand the test of logic, and that the facts I am able to present will prove incontrovertible.

In order to equip myself for my task, I read all the latest works dealing with telephone questions, and made a careful study of the various reports of municipal and legislative bodies that, within the past few years, have investigated telephone conditions in other cities. Reports and Court Records bearing upon the telephone question in New Orleans have received my most careful attention, and I retraced the history of the telephone in this City ever since its introduction by Mr. W. H. Bofinger, in 1877.

I obtained a number of statements from officials, past and present, of the Telephone Company here, concerning the business in New Orleans, and, in order to satisfy myself as to how local conditions compare with those in other cities, I prepared a comprehensive list of queries, which I sent to all the principal telephone companies throughout the United States. I was thus successful in obtaining detailed information as to telephone conditions in Greater New York, Chicago, Philadelphia, St. Louis, Baltimore, Boston, Cleveland, San Francisco, Cincinnati, Detroit, Buffalo, Pittsburg, Milwaukee, Washington, Newark, Minneapolis and St. Paul, Los Angeles, Louisville, Kansas City, Indianapolis, Providence, Rochester, Toledo, Columbus, Denver, Memphis, Portland, Nashville, Omaha, Scranton, Syracuse, Dayton, Fall River, Grand Rapids, Albany, Reading, San Diego, and Trenton.

416 Furthermore, I wrote to the Mayors of the above cities asking their opinion on the advantages or disadvantages of a dual system of telephones, and requesting copies of ordinances and reports dealing with the subject under consideration. I also invoked the aid of the Press, and asked the City Editors of the leading papers throughout the country to co-operate in getting information as to the quality of the service in other cities. A large number responded, thus placing me in possession of valuable information as to the number of calls *per diem* made by telephone users in other cities, and the number of connections completed by the companies.

More than five hundred letters have been written and received by me in the course of this inquiry, and I have sought the opinions of men connected both with the Bell and the Independent Companies. From some of the statements made, I am forced to the conclusion that it is dangerous to take as facts, the uncorroborated assertions of telephone experts. The antagonism existing between the rival telephone interests passes the bounds of ordinary commercial or industrial competition, and many statements made are not only conflicting but utterly irreconcilable.

When I had classified and examined the replies received to my queries from the various telephone companies, it became abundantly apparent that, in so far as the fixing of telephone rates is concerned, comparison with other cities is worse than useless—it is absolutely misleading. There are no two cities in the United States where conditions are sufficiently similar to warrant compari-

son. It is a fact beyond dispute that the question of telephone rates is purely and essentially a local one; and is controlled by four factors: First, the cost of the plant; Second, the cost of operation and maintenance; Third, the amount of taxes and dues paid to the City; Fourth, the rapidity of depreciation, due to the climatic conditions.

417 On the other hand, much valuable information was obtained as to the quality of service given in other cities; and as to the advantages and disadvantages of competition.

It did not appear to me to be necessary to visit other cities, with the exception of Nashville, Tenn., where the Cumberland Telephone & Telegraph Company has its headquarters, and keeps its main books of account.

I spent three days in Nashville, and made as thorough an examination as time permitted of the Company's books and records. I was given free access to every part of the head office, and every question I asked was at once answered. All the books and vouchers I called for were produced, and every facility was offered me by the Officers of the Company in the conduct of my examination. In another part of my report will be found full details of the manner in which I conducted this part of my inquiry, and the results I was able to obtain.

Before going to Nashville, I thoroughly mastered the Court record of what are known as the "toll rate cases," being two suits brought by the Cumberland Telephone & Telegraph Company against the Railroad Commission of Louisiana, now on the docket of the Supreme Court of the United States. The sworn statements of the Company's officers, I compared with the findings of the Special Commissioners appointed by the Committee of the City Council of Chicago, whose report represents the latest and most impartial expert information available.

During my stay in Nashville, I had several conferences with Mr. James E. Caldwell, the President of the Cumberland Company, and with Mr. W. L. Granberry, its General Counsel. These gentlemen expressed their appreciation of the action taken by the Board of Trade in instituting the present inquiry, and promised to do everything in their power to give satisfaction to the public, declaring that they were ready to go any length to secure the confidence and co-operation of the commercial community in this City. I am satisfied that the higher officials of the Cumberland Company were entirely ignorant of the state of affairs existing in New Orleans, and of the manner in which the public has been treated. The instances I was able to give, and which are detailed in that part of my report dealing with service and treatment of the public, caused them evident concern.

418 On my return to New Orleans, I found further correspondence awaiting me, and after carefully analysing all the available data, had several conferences with your Chairman, and decided to classify the information obtained as under:

*The Telephone as a Public Utility.*

It would be more correct to say the Telephone as a public necessity. Imagine a community suddenly deprived of the power of speech; and try to realize the horror of their predicament. Recall that each individual was only capable of conversing with those in his immediate presence, and could be heard but a very short distance. Then you will understand the value of an invention which extends, almost without limit, the carrying power of the human voice, and enables man to speak with man from one end of a City to another, or over vast tracts of country, as privately and as clearly as if both were in the same room.

No other means of communication is as satisfactory as the Telephone. Although the art is still almost in its infancy, it has already superseded the telegraph for all distances under one hundred miles,

419 and in larger cities, it is gradually taking the place of the mails, both for business and social communications. To the business man it is indispensable, it places him in direct touch with his customers and enables him to cater to their needs, without their having to come to his store. The telephone is scarcely less valuable in the home, as it commands all the resources and conveniences of a great city, facilitates social relations, and in emergencies, when every second is of moment, raises the fire alarm or calls the doctor.

Without taking into consideration the enormous saving of time and worry, the telephone pays for itself in car-fares and postage alone; and the value of its services is so entirely out of proportion to the cost at which they can be profitably rendered, that the telephone has come to be looked upon as a natural convenience which every man is entitled to make use of as freely as of the mail and transportation services. In a word, the Telephone is a public utility, the service of which is of unquestioned and primordial necessity to the well-being of the community.

I am clearly of opinion that a corporation rendering a public service of such a nature should be subject to proper public control; that its acts and doings should be so regulated as to best subserve the public convenience; and that its rates should be fixed as low as is consistent with a fair return on the investment. By a fair return, I mean such as will attract the capital necessary to satisfactorily and fully develop the business.

It is true that great hardship is thus laid upon the men who were the first to see the value and appreciate the utility of the invention. These men had faith when others doubted and scoffed; they took the risk, invested their own money, and the money of their friends, in the telephone industry, and now that they have made it a public utility, and have rendered it indispensable to their  
420 fellow-men, they are told that their profits must be strictly limited; that the control of the structure built up by their life work must ultimately pass into the hands of the public, and that they are to get nothing for the risk taken and the service ren-

dered to the community at large. This is the plain English of it; but in these matters, the greatest good of the greatest number must be the ultimate aim, and seeing how absolutely indispensable the telephone is, I am unshaken in my belief that corporations rendering such public service (telephone and telegraph companies) should be regulated by duly constituted authority until such time as the Federal Government is prepared to take them over and run them in connection with the Post Office Department, of which they are a natural development.

But it is evident that this right of public control which is vested in the people, as the fountain head of all authority under a Republican system of Government, must be used to safe-guard and not to violate the rights of private individuals; especially is this so in the case of persons who undertook the hazardous task of developing an invention from an ingenious mechanical device or scientific toy into a service of public utility.

### *The Telephone as a Business.*

Taken as a whole, the telephone business in this country has not been anything like a complete success. There have been innumerable failures, large and small. Competition has been very keen, and not always honest; in many instances, promoters have swindled the public in telephone ventures; distrust has been created; the financial interests of the country have lacked confidence in the business; and, notwithstanding the fact that the telephone is a  
421 public utility, savings banks, trust companies and other like institutions do not invest money or trust funds in telephone securities,—one of the reasons for this being that the assets could not be turned to any other use than that for which they were originally intended.

This brings home the fact that the appliances, plant and structures of a telephone company are of a very unstable nature. The property is essentially perishable, easily damaged, and deteriorates very rapidly. The industry has not yet reached a point of stability, and costly appliances are frequently being superseded by other inventions, and have to be discarded long before they are worn out; radical changes are continually being made in construction methods and in equipment, and all these things have contributed to make the telephone business, taken as a whole, an extremely hazardous one. If a telephone company should cease to do business, it would not be able to salvage more than about 20% of the original cost of construction.

In some respects, the telephone business is paradoxical and unlike any other. For instance, in ordinary business and in such public service corporations as gas, electric light, water, etc., the greater the number of patrons, the cheaper per unit can the service be furnished. With the telephone the exact reverse is the case, and the more telephones are connected with an exchange, the more the cost per telephone increases. As the number of subscribers connected with an exchange increases the value of the service to each individ-



ual subscriber increases likewise. It is clearly of greater value to be able to talk with 5000 than with 500, and as the opportunity increases the use increases also. Each subscriber uses his telephone more often per day on an exchange of 5000 than he would on exchange of 500, and it may be stated as a fact that the cost of operating for each telephone in any exchange increases as the value of the service to the individual subscriber augments.

This is susceptible of very clear demonstration. An operator can only answer a given number of calls a day, whether she be working in a large or small exchange. Five hundred connections per day is stated to be a fair average. Now in an exchange of 500 subscribers, where each man uses his telephone four times a day, there will be 2000 calls, and four girls will be able to do the work, or one to every 125 subscribers. If in an exchange ten times as large, with 5000 subscribers, each one uses his telephone, say, two and one-half times as often, the average number of connections per subscriber will be ten a day, or an aggregate of 50,000 a day. This will call for the services of 100 operators, or one for every 50 subscribers. This illustration is purposely exaggerated,—but it makes the point clear.

Furthermore, the cost of switch-boards increases per unit line, with the addition of subscribers. The unit equipment costs say about \$5.00 per line for the 500th subscriber, and nearly ten times as much for the 5000th. In other words, the cost of a switch-board per unit increases greatly with the added capacity.

This peculiarity of the telephone does not seem to have been sufficiently apprehended by the pioneers in the business, and, throughout its development, new problems have continually arisen that have been solved, or are still being worked out by the aid of experience, which has been dearly paid for both by the telephone companies and the public.

### *Business Methods Experimental.*

Even to-day, the telephone business is being conducted in a manner which, to a certain extent, is tentative and experimental. New methods are continually being tried out, and efforts are being made to rectify the many errors of the early days, when every consideration of business policy and commercial prudence was made subservient to the necessity of introducing the new invention and educating the public up to the use of the telephone. It is hardly credible to what lengths the telephone companies went in their anxiety to install telephones. In the first place, they voluntarily undertook to do the interior wiring of their subscribers' houses, and this has now become a well-established practice, and is looked upon as an expense inherent to the telephone business.

Then they put their business on a subscription basis, by the introduction of flat rates. They charged their patrons so much for the rental of the transmitter and receiver, and nothing for the actual communications made. This policy is responsible for the fact that the greater part of the public looks upon the instrument hang-



ing on the wall as constituting the sole expense to the company, because it is what they are actually asked to pay for; whereas, it is only the instrument indispensable to the sending and receipt of messages, each and every one of which entails a fixed and certain cost upon the company.

A strictly flat rate telephone charge to all patrons is every bit as unfair as a similar charge for gas or electric light would be. No one will deny that it would be absurd to charge a fixed rate per year for gas burners, regardless of the quantity of gas burned. Before electric meters were perfected, incandescent lamps were charged for at a fixed rate, which, as in the case of the telephone to-day, was lower for residences than for business places. It is pointed out in the report of the Chicago Special Telephone Commission that as long as this unfair and unbusinesslike method was in  
424 vogue electric lighting remained a luxury. With the advent of charges for actual consumption (that is measured rates) electric light came within the reach of the great proportion of people who now use it.

To illustrate my meaning more forcefully. The flat rate for all patrons whereby a fixed sum is charged for the use of the telephone instrument irrespective of the number of messages sent, is like conducting a restaurant on the plan of hiring a knife and fork to each customer at a fixed rate which would be the same whether a man had the run of the entire kitchen, or only ordered ham and eggs.

Now that the Companies have come to see the injustice of charging a patron who uses the telephone five times a day the same price as one who uses it fifty, they are making great efforts to introduce limited service and measured rates, which go to the other extreme and charge only for the messages sent, and nothing for the hire of and convenience in having the instrument itself.

To my mind, the proper way to charge for telephone service is to fix a flat rate for the privilege of connection with the exchange, and for the hire of the instrument itself, and then to charge a given sum for each message sent. The charge for connection with the exchange should be sufficient to cover interest and sinking fund charges on the investment of fresh capital represented by each additional subscriber, and the charge per message should be governed by the traffic and expense of the exchange.

Although virtually no one is aware of the fact, New Orleans is one of the very few cities in the United States in which such an equitable rate is in force, and here, any one can have a direct line service to his residence on payment of \$2.00 per month, and a charge of two cents for each outward message, inward messages being free.

425 But in practice flat rates based upon past experience and to which the public is accustomed, are already in existence here, and, taking into consideration the primitive methods employed for recording calls, it would be undesirable to eliminate flat rate service at the present juncture, and I recommend that the public be at liberty to choose between the different classes of service now offered by the Company.

The reduction of calls per telephone following the use of measured rates has been shown to be more than 50%. This correspondingly reduces the percentage of unavailing calls which are approximately one-third of the total number in New Orleans, and a notable reduction of operating expenses ensues, tending to render practicable a general reduction in the rates.

It is necessary to point out here that the principal objection to measured rates lies in the difficulty of insuring an accurate account of the messages sent. At present in New Orleans, records are kept with pad and pencil by the operators, and occasions for error are numerous, although it must be admitted that the girls are more likely to forget to mark calls than to over-charge.

This is the most primitive method of recording calls. It compels each operator to perform a certain amount of work in addition to the necessary switch-board manipulations, and this extra work—the taking in hand of a pencil and marking of the call and laying down the pencil again—necessarily interferes with the operating more than would the registering by means of a mechanical or push button device. Pad and pencil recording means more operators; this, in turn makes a larger switch-board equipment necessary; all of which tends to increase the cost of operating.

In New York, which has, by far, the largest and best equipped telephone system in the world, the lines are individually connected with a recording system, described in detail in the special report of the Merchants' Association on telephone rates and service in New York City. The Chicago Telephone Company has developed a meter, which makes it impossible to register more than a single unit for each connection, and which cannot register a call at all until the connection has been made. This has been accepted by the Windy City as conforming to the requirements of subsection "G" of Section 6 of the Telephone Ordinance passed on Nov. 6th last, which provides that the Chicago Telephone Company shall install, in connection with each measured service line of its lessees and subscribers, a meter which shall prove effective in actual use for accurately and correctly recording the number of outgoing messages or conversations over the said line.

The installation of such meters in New Orleans should, in my opinion, be made compulsory. In this connection, I may mention that as toll line calls are registered by means of a clock-work calculagraph, which reduces the possibility of error to a minimum, the foregoing remarks about the recording messages do not apply to long distance calls.

#### *Party Lines & Extension Sets.*

Another most regret-able mistake made by the telephone companies in their anxiety to increase the use of their invention was the introduction of Party Lines. The proper way to connect patrons to the exchange is by means of direct wires, which insure privacy, and the exclusive use of the line. In a Party Line, two, four, six, or even ten subscribers are put on the same line, and when any one subscriber is using the line, either to receive or to send a message,

the other subscribers are deprived of the use of their tele-  
427 phones. A complicated system of signals is needed to ring  
the individual subscribers, great delays and inconvenience are  
caused by the lines being busy, and even the patrons having direct  
lines are inconvenienced by not being able to get their messages  
through to Party Line subscribers whenever any other patron on the  
same Party Line is using his telephone. It is no exaggeration to  
say that at least two-thirds of the unavailing calls in the City are  
due to the common nuisance of mutual interference by Party Line  
subscribers.

The introduction of Party Lines has also greatly increased the  
public discontent, and has fomented distrust of the company in this  
manner: When the first subscriber on a given Party Line is con-  
nected with the Exchange, he has, to all intents and purposes, a  
direct line at the cost of a Party Line. When a second subscriber  
is added, he begins to feel the inconvenience which goes on increasing  
till when five or six are on the same line the service is so noticeably  
inferior to what it was at the outset that denunciation of the Com-  
pany becomes general.

I have no hesitation in stating, as a fact, that the telephone service  
in New Orleans cannot be brought to the degree of efficiency the  
public has a right to demand so long as the Party Lines now in  
existence are allowed to continue. I recommend that Party Lines  
be entirely abolished for business telephones and that for residences,  
not more than two patrons be placed upon the same line.

Extension sets are another draw-back to good service; they are  
but Party Lines under another name, the only difference being  
that the several telephones on the same line are situated in the same  
building and paid for by the same subscriber, instead of being  
situated in separate buildings and paid for by different subscribers  
in the same street or block. In some instances, extension sets

428 are the cause of even greater trouble than ordinary Party  
Lines, for the temptation is strong for persons in the same  
building to use their extension sets to talk with one another; some  
firms in town have bells and buzzers fixed to their extension sets,  
so as to enable the various members to call each other. When this  
is done, as soon as the receiver is taken off the hook, the signal  
flashed on the Exchange switch-board, and the Operator gets in  
on the line and says "number". She is told to get off the line, and  
is apt, when the same number signals again not to answer, although  
a connection may be wanted.

Although it is scarce believable, the Cumberland Telephone Com-  
pany in this City has made confusion worse confounded by actually  
putting extension sets on Party Lines, there being perhaps a hundred  
such cases in town. In one instance, a subscriber on a Four Party  
Line has three extension sets, and I am informed that another has  
no less than seven extension sets on a Four Party business line, with  
unlimited service. Until these sore spots are healed, it is impossible  
to give anything like good service.

On a party line, an extension set is grossly unfair to the other  
subscribers: Take the instance of a two Party Line on which one of  
the subscribers has an extension set. The man with the extension set

has two telephones, from either of which he can speak as against the other man's one. His facilities for using the line are materially increased, and the facilities of his neighbor, who pays full Party Line rates, are correspondingly decreased, and are less than the latter is entitled to under his contract with the Company.

I am strongly of opinion that extension sets should never, under any conditions, be placed upon Party Lines, and that their use on direct lines should be strictly confined to the purpose for which they were originally and primarily intended, to enable a telephone user to speak over the trunk line from his chair or desk, without having to go to the main instrument in some other part of the building. The use of extension sets for intercommunicating purposes must be put a stop to, as it is a very serious detriment to the general service.

The above recommendations may appear unduly drastic and onerous to the Company, but I take it irrespective of the question of rates, the public, above all things, wants and is entitled to a service of the highest efficiency, a service that will be prompt, accurate and reliable, and I am firmly convinced that this can only be obtained by striking at the root of the evil, and eliminating the things that make the service slow and unreliable. A bad telephone service is dear at any price, and I am guided in making the above recommendations by a desire to obtain for the people of New Orleans through intercommunication by the adoption of the most up-to-date apparatus and the latest and best operating methods whereby telephone service has been brought to the highest state of efficiency in other cities.

#### *Special Conditions in New Orleans.*

It is claimed by the Cumberland Company that the cost of telephone construction and maintenance is very considerably greater in New Orleans than in any other large City in the United States, and that, owing to climatic conditions the depreciation of the plant when constructed is more rapid than it would be if situated elsewhere. It is said that the soil here is so soft and alluvial that the poles have to be set at extra depths, and additional precautions taken in tamping the ground around the poles, and that it is often necessary to specially guy poles with anchors to hold them in place, and that in some parts of the City, it has been found indispensable to make a bed of concrete around the poles to hold the poles on the anchors at all. In order to resist the effects of the moisture, the Company is using very heavy creosoted poles, which are more expensive than the common kind. The state of the roads in some parts of the City is such that it is impossible to haul full loads, and construction and reconstruction gangs spend more time over a given piece of work here than elsewhere.

It is further alleged that climatic conditions are such that all outside construction work deteriorates more rapidly than in other cities served by the Cumberland Company, and that labor is more expensive and less reliable here than elsewhere. I believe these statements to be, in the main, correct but, in the short time allotted to

me for this inquiry, I have not been able to get construction specifications from companies in other cities, which would have enabled me to compare the cost of construction item for item. It seems, however, that it would be cheaper to lay underground conduits in New Orleans where the soil is soft and easily dug than in cities where trenches have to be blasted through solid rock; but then again, it is said that in New Orleans the soil is so soft in places that it becomes necessary to lay the conduits on a concrete foundation, which is even more expensive.

One thing is certain, and that is that the cost of material used in telephone construction has advanced enormously in recent years. For instance, copper wire for the last year or more has stood at from 24 to 26 cents a pound; whereas, formerly it cost only 13 to 16 cents, and, at times, was lower than 13. Poles which used to be \$13 to \$15 a thousand feet are now as high as \$60. All electrical equipment has increased in price, and it can be stated as a fact that it would cost more to build a given telephone plant to-day than it would say  
 431 five years ago. As to how much more it costs to build and maintain a plant in New Orleans than elsewhere, I cannot say with certainty, but I am satisfied that the difference is considerable.

#### *Telephone Development in New Orleans.*

Coming down to the development of the telephone business in New Orleans, which has been very closely investigated by me, in order to find out what truth there is in the oft repeated allegation that the Cumberland Telephone & Telegraph Company has no legal right to the franchise under which it operates in this City, I have little hesitation in declaring that whatever technical flaws, due to lack of care and foresight of the original grantees, may have at one time existed, the Company has perfected its title to the franchise and no useful purpose would be served by attacking its position, which the best legal talent is unanimous in regarding as well nigh unassailable.

The telephone was first brought to New Orleans in 1877 by Mr. W. H. Bofinger, who was associated with John W. Bofinger and W. W. Huch in the operation of the American District Telegraph System. When visiting the centennial exhibition of 1876, Mr. Bofinger was so impressed by the first Bell principle of an electro magnetic transmitter and receiver that he entered into a territorial contract to exploit the invention in Louisiana and New Orleans. He brought back with him a line equipment of these instruments, and gave to the public one or two demonstrations of their application and convenience in connecting commercial or industrial points that up to that time had been served by messengers carrying written slips. These demonstrations attracted much attention, and in the early part  
 432 of 1877 contracts were made for the building and equipment of special private lines, first among which was one connecting the sales room and factory of Potter & Rice, followed by contracts with Maximillian Hermann, B. D. Wood and others, until about 150 private wire installations had been put in by Mr. Bofinger and his associates. The invention of the switch-board offered a

broader usefulness to the existing private lines, and when the owners of the latter had explained to them the advantages to be derived from the diversion of their private lines into a central station equipped with the new switching apparatus, they readily agreed to bear the expense of such diversion, and an intercommunicating exchange, with a nucleus of more than three hundred stations, was established, without any additional cost to the promoters than the switch-board, which amounted to about \$9,000.

Then it was that Messrs. W. H. Bofinger, John W. Bofinger and W. W. Huck, trading under the name of the New Orleans Telephonic Exchange, obtained from the City Council a franchise and right-of-way under administrative series 4900 of February 18th, 1879. The following year, the three owners of this pocket corporation met and formed the Louisiana Telephone Company, with a capital of \$200,000. In the deed of assignment of transfer of the property from the New Orleans Telephonic Exchange to the Louisiana Telephone Company, no specific mention is made of the franchise and right-of-way granted by the City, and there seems to have been no effort on the part of the former owners to identify themselves in the document with the grantees. When the Louisiana Telephone Company sold out to a syndicate—which, in 1883, formed the Great Southern Telephone and Telegraph Co., great care was taken to transfer the franchise rights in legal form, and this was also the case when the

Great Southern was merged with the Cumberland Telephone & Telegraph Company. In a decision of the Supreme Court of Louisiana, rendered by Judge Fenner, in the case of the City of New Orleans vs. the Great Southern Telephone & Telegraph Company, the Court held, as a fact, that the Great Southern was the assignee and successor of the New Orleans Telephonic Exchange referred to in the ordinance of February 18th, 1879, and since then, the City of New Orleans has itself recognized the Cumberland Company as being entitled to the grant. Furthermore, Messrs. Bofinger and Huck, the original owners, have made affidavits that it was their purpose and intent in 1880 to transfer the franchise and right-of-way they held from the City to the Louisiana Telephone Company, and that they actually did complete such transfer. It does not appear possible to now question the title of the Cumberland Company to the rights conferred by the City under said ordinance.

#### *Cumberland Company in New Orleans.*

The Cumberland Telephone & Telegraph Company was incorporated under the laws of the State of Kentucky in June, 1883, with an authorized capital of \$3,000,000, and with executive offices in Nashville, Tenn. It has been engaged in the telephone business in Tennessee, Southern Indiana and Southern Illinois since 1883, in Louisiana and Mississippi since 1898, and in Kentucky, Alabama and Georgia since 1899.

The present capitalization of the Cumberland Company is \$19,680,150; it has a bonded debt of \$760,000; and \$239,000 Debentures outstanding. Its surplus, reserve, and undivided profits amounts to more than \$4,000,000 and have been reinvested in the plant and in



real estate (exchange buildings). An investigation of the  
 434 company's affairs conducted by the Legislature of Tennessee  
 showed that its capitalization is entirely free from water.  
 The following table shows the growth of the company from 1894  
 to the present time:

Year.	Capital stock.	Dividend.
1894	\$ 1,695,700	4 per cent
1895	1,695,700	4 "
1896	1,695,700	4 "
1897	1,695,700	4 "
1898	2,875,000	5 "
1899	3,459,200	6 "
1900	6,017,700	7 "
1901	7,261,200	7 "
1902	9,106,200	7 "
1903	11,367,250	7 "
1904	11,695,350	7 "
1905	13,449,650	7 "
1906	16,812,050	7 "
1907	19,680,150	— —

On the 1st of March, 1898, the Cumberland Telephone & Telegraph Company purchased the plant of the Great Southern Telephone & Telegraph Company in Louisiana and Mississippi by issuing to the shareholders of the latter 9,458½ shares of the Cumberland Capital stock, fully paid up, in exchange for 18,917 shares of the Great Southern capital stock then outstanding,—one for two.

It can be stated, as a fact, that prior to the acquisition of the telephone interest in New Orleans by the Cumberland Telephone & Telegraph Company, but little had been done toward developing the telephone business here. This was due greatly to lack of capital. The exchange area was virtually limited by Jackson Avenue, Claiborne Avenue, Iberville Street, and the River. Outside of this area, there were less than one hundred telephones. The total number of instruments in use in New Orleans was only 1641, excluding the telephones used by the Company in its business. There were only 8 telephones in Algiers.

435 The system was almost entirely what was known as open wire system, there being less than three miles of cable in the entire system of New Orleans. All of this service was on grounded lines (single wires), and the wires were run on poles belonging partly to the telephone company, street car company, telegraph companies and electric light companies, or on trees, house tops and buildings. The instruments in use were of the magneto (turn crank) type, equipped with Blake transmitters, and there were less than 50 long distance instruments in the City. There were very few residence telephones, and the only long distance lines out of New Orleans, of which I find mention, were one into St. Bernard Parish, one into Plaquemine Parish beyond Point-a-la-Hache, a circuit line to Baton Rouge, and another to Donaldsonville, La.



Taken as a whole, the plant of the Great Southern did not amount to much more than scrap, and it had to be entirely re-built. It is claimed by the District Superintendent of the Company that at the present time "New Orleans is in communication with virtually every town, village and postoffice with which it does business, and that long distance lines reach cotton and sugar plantations and rice farms everywhere." This statement is, however, contradicted by the sworn testimony of Mr. Leland Hume, the General Manager of the Company, who, in the toll rate cases, affirmed that "Very little of the State of Louisiana is developed from a telephonic standpoint, the interior sections comprising by far the major portion of the State is hardly touched with telephone lines as yet—and the parts away from the railroads have been touched but lightly anywhere."

But however complete or incomplete the saturation of the surrounding territory, the construction work of the Cumberland Telephone Company within the City of New Orleans speaks for  
436 itself. The plant is thoroughly up-to-date and has been built to accommodate 30,000 subscribers, or nearly three times as many as are now connected with the exchanges. The Company's present investment in the City alone represents close upon \$3,000,000. As far as mechanical facilities are concerned, New Orleans is equipped in a manner that should make it relatively easy to give first-class service.

It was, however, admitted to me by the general officers of the Company that, having in view the conditions existing in New Orleans, they did not feel justified in increasing their investment here, and had virtually shut down on development. In the telephone business, the moment a plant ceases to grow, it retrocedes, and every moment of construction inactivity increases the difficulty in attracting fresh capital to continue the work that has been suspended. At the present moment, the only construction work being done here is on the new Jackson Exchange, which was planned and partly built more than a year ago.

I append a map showing the exchange limits within which service is given without extra charge. This district covers virtually the whole of the inhabited portion of the City of New Orleans proper, together with Chalmette, Spanish Fort, West-End, Southport, Milneburg, McLellanville, Algiers, McDonoughville, Gretna, Harveys, Amesville and Westwego, having a total area of 49½ square miles and an estimated population of 356,000 inhabitants.

#### *Cumberland Co.'s Earnings and Expenses.*

From my examination of the Cumberland Company's accounts, I was able to obtain exact information as to their earnings and expenses in New Orleans. The financial year of the Company

437 ends on the 31st of December, and, at my request, Mr. H.

Blair Smith, Auditor, furnished me with a statement showing the earnings, expenses and net revenue of the New Orleans Exchange for the year 1906, which, at the time of my visit, was the last completed financial year. This statement is as follows:

*Financial Statement.*

New Orleans, Louisiana, Exchange,

Year 1906.

<b>Earnings:</b>	
Rentals .....	\$570,501.32
Proportion Tolls earned by Exc.....	16,582.26
Miscellaneous .....	5,220.10
	<hr/>
	\$592,303.68
<b>Expenses:</b>	
General (including taxes) .....	\$ 94,776.20
Operating .....	129,402.51
Maintenance .....	104,912.05
Reconstruction .....	91,335.01
Depreciation .....	115,544.39
Instrument Rental .....	26,418.76
Bad Debts.....	5,313.02
	<hr/>
	\$567,701.94
<b>Net Revenue</b> .....	<b>\$ 24,801.74</b>
<b>Construction</b> .....	<b>\$2,482,792.80</b>
Per cent. of Net Revenue to Investment .99.	

In reference to the above statement of Earnings and Expenses, the following explanations must be made:

*Earnings.*

438      Rentals: include, first, all sums received from the public in New Orleans (whether in subscriptions or through pay-stations or coin collecting devices) for telephone service rendered by the Exchange, and rentals of private wires; second, all sums received from the use or care of lines, poles, batteries and apparatus (such as Private Branch Exchange, Switch-boards, etc.) and other property leased by the Company to its patrons: third, all sums received from the telegraph companies for services rendered by the Cumberland Telephone & Telegraph Company in connection with the telegraph service, and for the attachment of telegraph wires to the telephone poles.

Proportion of tolls earned by exchange: This represents first, fifteen per cent. (15%) of all sums received from the public in New Orleans for services over the Company's toll lines; second, sums received for leased wire rentals.

A "toll", it should be explained, is the charge made for a connection covering a time of specified duration between two telephone stations connected with two different exchanges located in separate cities or towns. The line over which such a conversation is held is called a "toll line."

Miscellaneous: includes sums received for advertising in Telephone Directory, profit on sales or job work, and such other items or revenue of small amount as cannot properly be credited to the above classes of revenue.

### *Expenses.*

General (including taxes). Under this heading are charged, first, a pro-rata of the salaries paid to the President, General Manager, Secretary, Treasurer, Auditor, Attorney, Engineer, Traffic Manager, Electrician, and other general officers and their office forces; second, a pro-rata of the rent, light and heat chargeable to the above; third, a pro-rata of the traveling expenses chargeable to the above; fourth, postage, printing and stationery expenses of the New Orleans Exchange; fifth, gross cost of the N. O. Directory; sixth, taxes paid to the City of New Orleans; seventh, legal expenses directly chargeable to New Orleans; eighth, incidental expenses, such as refunds or payments to the City other than those legally imposed, premiums on officer's bonds, exchange on drafts and checks, collection fees, and other items of small amount pertaining to the general expenses of the New Orleans office, which cannot be otherwise classified.

Operating: includes, first, under salaries and wages one-third of the salary of the District Superintendent, and of the Assistant District Superintendent; one-third of the salary of the Chief Clerk, together with the salaries of the Chief Operator, Assistant Chief Operator, supervisors, monitors, operators, pay station attendants regularly employed, Exchange book-keepers, cashiers, clerks, collectors, matrons and others whose work is incidental to that of the employees above named, also pay station commissions; second, a pro-rata of the rent paid to the Cumberland Company, together with charges for light, heat and care of space pro-rated to the amount of space occupied by the operating force; third, salaries and traveling expenses of the N. O. operating officers, commissions paid for securing new subscribers, and all expenses of advertising for new business, also charges for rent, light, heat and care of space occupied by canvassing and advertising force; fourth, incidental expenses, such as laundry, ice, toilet supplies, supplies for the comfort of operators, and items of small amount pertaining to the operating of the Exchange, which cannot otherwise be classified.

440 Maintenance: This is the current repair account, and represents the cost of keeping the existing property in good working condition, including the replacement of these parts of the property the normal working life of which does not exceed one year. In it are included, first, under salaries and wages, one-third of the salaries of the Manager and Assistant Manager, one-third of the salary of the Chief Clerk, one-half of the salaries of the Wire Chief, Assistant Wire Chief and Night Wire Chief, together with the salaries of the foremen and their clerks and stenographers, material clerks, linemen, inspectors, equipment men, groundmen, splicers, wiremen, laborers, teamsters, right-of-way-men, so far as not charge-

able to Reconstruction or Construction; second, a pro-rata of the rent paid to the Cumberland Telephone Company, together with charges for light, heat, and care of space pro-rated to the amount of space occupied by the maintenance force; third, all the material used in the repair of exchange or toll property, including battery supplies with freight and cartage thereon, power, current and incidental expenses connected therewith, also a pro-rata of the entire expense of handling the supply department; fourth, traveling expenses of the employees of the maintenance department while engaged in inspection, repair, or maintenance of the Company's property; fourth, all sums paid for the rental of underground conduits, attachments to poles of other companies, or for roof privileges; sixth, premiums paid for fire insurance, except on supplies; seventh, all sums paid as compensation for injury to persons; and for injury resulting to others incident to the construction, maintenance or operation of the property of the Company; eighth, incidental expenses, including rebates on account of temporary rights-of-way and items of small amount pertaining to the inspection and current repair of the plant, which cannot be otherwise classified.

441 Reconstruction: This account represents the expense of replacing portions of the plant, the normal life of which is more than one year. In making up the account, Reconstruction is charged with the cost of the property reconstructed, including the cost of its removal, less the value of the material therefrom used upon the new work or returned to the supply department. Any excess of the expenditure over the amount charged to Reconstruction and to the Supply Department for material returned is charged to Construction. This reconstruction account includes first, under the head of salaries and wages, one-third of the salaries of the District Superintendent and Assistant District Superintendent, one-fourth of the salary of the Manager and of the Assistant Manager, one-third of the salary of the Chief Clerk, and the salaries of the foremen and their clerks and assistants, cablemen, linemen, equipment men, groundmen, inspectors, splicers, wiremen, teamsters, laborers and others when employed upon reconstruction work, except the proportion thereof chargeable to Construction. The salaries of the Superintendent of Construction and of his office force and engineers engaged upon construction and reconstruction plans and estimates is apportioned each month between the several pieces of construction and re-construction work in progress on the basis of the respective expenditures under such estimates; second, a pro-rata of the rent paid to the Cumberland Company, with charges for light heat and care of space pro-rated to the amount of space occupied by the re-construction force; third, all material used in the re-construction of the plant, except that amount chargeable to Construction; also a pro-rata of the entire expense of handling the supply department; fourth, all traveling expenses of employees engaged upon re-construction, except the proportion thereof chargeable to construction; fifth, all other items of small amount pertaining to the re-construction of the plant which cannot otherwise be classified.

442 Depreciation: This is an amount set aside from the gross earnings of the Company as a reserve to meet the latent decay of the

plant, its destruction by catastrophe, such as storms, earthquakes, or conflagrations, or its becoming obsolete by reason of new inventions which are continually being made in connection with the telephone art. This fund is counted as a liability, and carried in the accounts as a liability, a debt that will have to be met and provided for in the future. It is seven-and-one-half per cent of the total Construction account chargeable to New Orleans, less the amount actually spent on re-construction. In every year, the amount charged to Depreciation, when added to the re-construction account, equals seven-and-one-half per cent of the Construction account.

This matter of Depreciation has been very thoroughly gone into by the Chicago Commissioners, who fix the proper charge at 8.03 per cent of the total value of the tangible property, excluding only land, stock of material, and cash on hand. The eight per cent total depreciation rightly chargeable in Chicago is made up of 2.25% for re-construction and 5.75% actual depreciation. Here in New Orleans in 1906, the total amount set aside was, as stated above, 7.5%, approximately 3.5% was spent on re-construction and 4% set aside for depreciation. It will thus be seen that the amount written off here is not excessive; nevertheless, I think it would be more satisfactory if, in keeping its accounts, the Company deducted from its construction account the amount of depreciation written off during the previous year. It seems to me that it is not wise to

443 write depreciation off of that part of the construction account which has already been written off before. However, if this change is made, it will be necessary for the Company to write off considerably more than  $7\frac{1}{2}\%$ . By whichever process depreciation is written off, there can be no doubt that to use the words of the Chicago Commissioners: "The rate at which the telephone art is advancing, and the delicacy of the apparatus used, makes it a matter of particular importance for a Telephone Company to establish a proper depreciation fund."

**Instrument Rental:** This is the sum paid to the American Bell Telephone Company under contract, and represents four and one-half per cent of the gross earnings of the instruments rented.

As I understand this arrangement, the American Telephone & Telegraph Company (which is a branch of the American Bell) rents these instruments instead of selling them to its subsidiary companies as a business proposition pure and simple, on the theory that good service requires the best appliances and that on good service the prosperity of its subsidiary companies depends. The parent Company argues that the temptation would be strong to a management that had invested a lot of money in subscribers' telephones to continue using them as long as they could be kept in working order, instead of replacing them when improvements were made. Under the existing contract, an old instrument can be exchanged for a new one at any time; if any defect appears, a perfect piece of mechanism is given in exchange for the defective one.

It may be stated, as a general proposition, that the rental charged for the instruments by the American T. & T. Co. is about twice the amount that would suffice to give it a fair return. In 1906, the

amount paid for instrument rental was \$26,418.76 on a total  
444 average number of 12,339 instruments, or a little more than  
\$2.14 per instrument. Admitting that the total annual item  
of cost to the American T. & T. Co. for furnishing these telephone  
sets, each containing a transmitter, receiver, and induction coil, is  
334% of their original cost, which is stated to be \$3.00, it will be  
seen that under this contract something in excess of \$14,000, is paid  
by the Cumberland Co. over and above what may be strictly consid-  
ered as a fair rental charge.

But under this contract, in addition to the rental of the instru-  
ments as above set out, the Company gets the expert advice and  
assistance of the parent Company's engineers, etc. This includes  
working specifications for switch-board installations, line and con-  
duit work, cable construction, building material, etc. Bulletins are  
also supplied, treating of engineering practice and operating methods,  
which summarized the experience and knowledge acquired by the  
various Bell companies. Special studies are continually carried on  
by the engineers of the American Bell Telephone Co., and that Com-  
pany maintains a well equipped laboratory in Boston, where tests  
and investigations are made for the benefit of the subsidiary com-  
panies. All of this service is rendered without extra expense to the  
Cumberland Co., and is paid for through this so-called instrument  
rental account.

Part of this payment is also fairly chargeable by the parent com-  
pany as a royalty for the use of the still existing telephone patents  
belonging to the parent company. Most important of these is what  
is known as the "Pupin" patent for improving telephonic transmis-  
sion by "loading coils." This enables the subsidiary company to  
reduce the cost of copper in its cables and trunk conductors between  
its main and branch exchanges.

445 Taken, as a whole, I am inclined to the belief that the  
contract is of decided advantage to the Cumberland Co.

Bad Debts: Under this heading are included all uncollectible ac-  
counts. The head office has a sub-division of its general incidental  
accounts, and when it is decided to write off a bad debt, the local  
office is allowed to take credit for it, and it is transferred from the  
account of the local office to the above-mentioned sub-division of  
the general incidental account, and is charged to the local exchange  
as an expense in the month in which this is done.

Net Revenue: This is the difference between the earnings and  
expenses of the New Orleans Exchange. It would be better styled  
as "net earnings."

Construction: This is the actual money spent in the construction  
of the plant, less the first cost of the reconstructed portions thereof.  
This item does not include any real estate, nor supplies, nor work-  
ing capital, nor interest on anything whatsoever. It is the Com-  
pany's net investment in its New Orleans Exchange.

The above statement and explanations were subjected by me to  
the closest scrutiny, and every item checked off and verified by  
actual examination of the books and vouchers. As it would have  
been impracticable to examine one by one all the vouchers of the



New Orleans Exchange for the year under examination, at my request, the vouchers for the month of September were brought down, and I examined a very large number of them. There is a double system of checking in use, and, in every case, I found that the vouchers had been correctly charged, according to the foregoing classification. I was most particular in my examination of the Maintenance and Re-construction accounts to verify the proper classification of labor other than operating, and made a close check upon the charging of the Construction account.

446 Vouchers dealing with charges for Maintenance were found for trimming trees, pulling slack, replacing broken knobs and insulators, repairs of underground conduits, repairs of aerial or underground cable, re-grouping subscribers on Party Lines, locating and removing trouble of all kinds, whether on lines or apparatus, repairing, adjusting or repainting poles, carbons, fuses, heat coils, etc., replacing batteries and telephone and switch-board cords, re-banking and straightening of poles, etc.

I found Re-construction charged with disconnecting and taking out subscribers' instruments, removing drop wires from poles to subscribers' buildings, re-setting poles that had rotted off, moving instruments of parties within the same room or building, moving poles on account of changes in curb lines or in grades of streets, or on account of gates, etc.; that part of labor required in substituting larger poles, wires, cables, etc., for smaller ones that would have been required if the wire or the cable were of the same size as the old (Construction being charged only with such labor as represented the actual increase in the plant); for replacing guys, braces or anchors, re-placing or removing switch-boards; re-placing or removing parts of switch-board equipment, the life of which is considerably more than a year; and re-placing worn out bells, wires or cables with material of the same size and character.

Construction, I found by the vouchers, was charged where poles were re-placed by larger ones with the excess of labor over that which would have been required if the poles had been re-placed with ones of the same size (the balance of the expense being charged to Re-construction); addition of new poles, addition of pins, 447 guys, braces, brackets and cross arms on poles, pole steps, lightning rods, pole guards, cable seats or platforms on poles; the addition of cable terminals and lengths of cable; the addition of open wires extending from the central office and exchanges to the subscribers' buildings; the addition of insulators and bridal wires; the difference when a smaller cable was replaced by a larger one, of the amount which would have been spent if the new cable had been the same as the old one, the balance being charged to Re-construction.

At my request, the financial statement for the year 1906 of the New Orleans Exchange was extended in detail, showing the amounts earned and spent under each of the above mentioned sub-divisions. This statement was supplied by Mr. H. Blair Smith, and is as follows:



## Financial Statement.

New Orleans, La., Exchange, Year 1906.

Subscribers January 1st.....	11,725
Added during year.....	3,509
Discontinued during year.....	2,039
Average for period.....	12,339

## Earnings:

Av. per Sub.

Rentals from Subscribers.....	\$530,047.35	
Pay Stations .....	38,611.75	
Telegraph Companies .....	1,842.22	
	<hr/>	
	\$570,501.32	\$46.24
Proportion tolls earned by Ex.....	\$16,582.26	\$1.34
Miscellaneous .....	5,220.10	.42
	<hr/>	
	\$592,303.68	\$48.00

## Expenses:

(See statement attached).....	\$567,701.94	\$46.00
448 Balance of foregoing.....	\$24,601.74	\$2.00
Cost of Plant.....	2,482,792.80	
Per cent of Net Revenue of Investment....	.99	

## Expenses.

New Orleans, La., Exchange, Year 1906.

## General:

Av. per Sub.

Salaries and Wages.....	\$16,282.47	\$1.32
Rent, Light and Heat.....	651.30	.05
Traveling .....	2,279.55	.18
Postage, Printing and Stationery.....	10,875.41	.88
Directory .....	8,971.72	.73
Taxes .....	44,736.32	3.63
Legal .....	8,323.23	.67
Incidental .....	2,656.20	.22
	<hr/>	
Total General.....	\$94,776.20	\$7.68

## Operating:

Salaries and Wages.....	\$106,145.34	\$8.60
Rent, Light and Heat.....	10,116.41	.82
Advertising and Canvassing.....	9,286.88	.75
Incidental .....	3,853.88	.32
	<hr/>	
Total Operating.....	\$129,402.51	\$10.49

## Maintenance—Current Repair:

Salaries and Wages.....	\$69,775.92	\$5.65
Rent, Light and Heat.....	2,096.40	.17
Material .....	4,502.96	.36
Traveling .....	14,377.38	1.17
Conduit, Pole and Roof Rent.....	1,142.38	.09
Insurance .....	5,293.11	.43
Damage and Compensation.....	6,326.36	.51
Incidental .....	1,397.04	.12

Total Maintenance.....	\$104,912.05	\$8.50
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## 449 Re-Construction:

Salaries and Wages.....	\$40,769.68	\$3.30
Rent, Light and Heat.....	5.63	
Material .....	44,731.55	3.62
Traveling .....	5,828.15	.48

Total Re-construction .....	\$91,335.01	\$7.40
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Instrumental Rental.....	26,418.76	2.14
Depreciation .....	115,544.39	9.36
Bad Debts .....	5,313.02	.43

Total Expenses .....	\$567,701.94	\$46.00
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To the above statement, I took the following exceptions:

First: That only fifteen per cent of the toll receipts in New Orleans were credited to the Exchange, notwithstanding the fact that in the bill of complaint filed in the United States Circuit Court, in the case of the Cumberland Telephone & Telegraph Company vs. The Railroad Commission of Louisiana, the Cumberland Co. averred that it was and is not possible to separate the expenses incurred in giving toll service from the expenses incurred in giving exchange service for the reason that the two are so interwoven that they cannot be separated. In this bill of complaint, it is stated that:

"The same poles carry exchange subscribers' wires and toll line wires; the local managers of the different exchanges care for and supervise the construction and maintenance of toll lines as well as of exchange lines; the same operators are engaged in giving connections for toll service and exchange service; the same accounting departments in each exchange are engaged in looking after the accounts of both classes of business; the same linemen, troublemen and other employees are engaged in caring for and repairing both the exchange and toll lines; the rent, light, heat items are not capable of being separated between the two classes of business, and it results that while the receipts from the two classes of business can be accurately separated, the expenses of giving service cannot be separated, nor is it desirable that they should be separated, for the reason that it would entail a very great increase in the cost of maintaining each class of business."

This being the case, I think it right and fair that New Orleans should be credited with her full share of toll receipts, less coupon discounts, and charged with the resulting increase in instrument rental, and with depreciation on her pro-rata of toll line construction, which construction pro-rata should be added to the Construction account of the New Orleans Exchange.

Second, I found under the item "Taxes," the payment to the City of a sum of \$7,352.33, not legally imposed, but voluntarily made, by the Company under what is known as the "Three Per-Cent Agreement," which is sufficiently explained by the following extract from a letter addressed by the Company on March 8th, 1906, to his Honor the Mayor, and the Honorable City Council:—

"I beg to repeat that the Cumberland Co. is in the enjoyment of a grant, made in 1879, which gave it, for legal consideration, the right to conduct its business and make use of the streets, and cannot, therefore, make any payment or contribution to the City as a consideration for a grant already acquired, but that recognizing the fact that the grant has, by reason of the great development of the telephone business, proved to be of great benefit to the Company, the Company is willing to pay to the City of New Orleans, quarterly, on the first days of January, April, July and October of each year, beginning July 1st, 1906, three (3%) of its gross receipts from rentals paid by telephone subscribers for rental of telephones in the City of New Orleans, so long as the Cumberland Co. is alone operating in the City; that is, so long as its revenues are not depleted by a division of the telephone business, and the value to it of the use of the streets diminished by a division of that use for the same purposes. Should any other person or Company acquire the right to conduct a telephone exchange or business in the City, the Company would not feel justified in continuing its payments, and would cease to make them."

451 If the Cumberland Co. honestly believed that the financial statements appearing on its own books gave a true record of its earnings and expenses in New Orleans, it must have written the above letter under the impression that its earnings were less than 1% of its investment, and I cannot conceive it possible that it felt justified in paying away 25% of its already meagre earnings, if there had not been some ulterior motive besides the expressed desire to add something to the legal consideration it is obliged to give under its franchise to do business in this City.

I am convinced that this payment was tendered to the City as a sop or bribe to keep out competition. I am advised that, under the constitution of this State, any agreement between a City and a corporation selling the monopoly of a public service by private contract or agreement would be null and void, and, to my mind, it is highly improper and undignified for the City to accept and put into its coffers, in this manner, money that it would have no right to, except under its present guise of a gratuity.

As far as the keeping of the Cumberland's accounts is concerned, I do not think that this payment can properly be looked upon as a

tax; it is an expense incidental to a certain policy adopted by the Company, and should be charged under the heading of Incidental General Expenses. It must be borne in mind that this amount is not spent for the operation, maintenance or re-construction of the Company's plant, nor is it essential to the continuation of the business, nor is it a tax legally imposed, and that it is just so much taken away from the net earnings of the Company.

Third. It appeared unfair the New Orleans should be made to bear the entire amount of the salaries of the District Superintendent and of the Assistant District Superintendent of the Louisiana District, and I have deducted one-half from the amount thus improperly charged to the operation, maintenance and re-construction accounts. Mr. H. Blair Smith explained to me that he had already made the distinction I suggested in the 1907 accounts, and that, in the future, the salaries of the District Superintendent and Assistant District Superintendent would be apportioned fairly between New Orleans and the rest of the Louisiana Exchanges.

Fourth. It also appeared to me undesirable that the Maintenance account should be charged with \$2,096.40 for rent, light and heat, and that the Re-construction account should only be charged with \$5.63. I, consequently, apportioned the total amount of rent, light and heat chargeable to Maintenance and Re-construction between the two accounts on the basis of salaries and wages, which I believe to be just and equitable.

Fifth. Owing to a clerical miscalculation, the Company's statement contained an unfortunate error in the amount of depreciation charged. This appeared as \$115,544.39, which sum added to the Re-construction account of \$91,335.01, gives a total of \$206,879.40; whereas,  $7\frac{1}{2}\%$  on \$2,487,792.80 only amounts to \$186,209.46.

All these changes have been made in the following revised statement, which shows the net earnings of the New Orleans Exchange, for the year 1906, including the pro-rata of tolls as suggested by me, to have been \$113,930.78 on an investment (Construction account) of \$2,781,716 being a net return of 4.095% on the Company's total investment in this City as against 0.99% shown in the Company's first statement.

#### *Financial Statement.*

##### New Orleans, La., Exchange, Year 1906.

	Subscribers, January 1st.....	11,725
453	Added during year .....	3,509
	Discontinued during the year .....	2,039
	Average for year.....	12,339

Earnings:		Av. Per Sub.
Rentals: From Subscribers .....	\$530,047.35	
Pay Stations .....	38,611.75	\$46.24
Telegraph Co's .....	1,842.22	
	<hr/>	
	\$570,501.32	
Tolls .....	108,326.39	8.78
Miscellaneous .....	5,220.10	.42
	<hr/>	
	\$684,047.81	\$55.44
Expenses:		
(See statement attached) .....	\$570,117.03	\$46.21
Balance of foregoing .....	113,930.78	9.23
Cost of Plant .....	2,781,716.00	
Per Cent Net Revenue to Investm't.....	4.095	

*Expenses.*

## New Orleans, La., Exchange—Year 1906.

		Av. Per Sub.
General:		
Salaries and Wages .....	\$16,282.47	\$1.32
Rent, Light and Heat .....	651.30	.05
Traveling .....	2,279.55	.18
Postage, Printing and Stationery .....	10,875.41	.88
Directory .....	8,971.72	.73
Taxes .....	37,383.99	3.03
Legal .....	8,323.23	.67
Incidental .....	10,008.53	.82
	<hr/>	
Total General .....	\$94,776.20	\$7.68
454 Operating:		
Salaries and Wages .....	\$104,795.34	\$8.49
Rent, Light and Heat .....	10,116.41	.82
Advertising and Canvassing .....	9,286.88	.75
Incidental .....	3,853.88	.32
	<hr/>	
Total Operating .....	\$128,052.51	\$10.38
Maintenance—Current Repair—		
Salaries and Wages .....	\$68,425.92	\$5.54
Rent, Light and Heat .....	1,333.70	.11
Material .....	4,502.36	.36
Traveling .....	14,377.38	1.17
Conduit, Pole and Roof Rent .....	1,142.38	.99
Insurance .....	5,293.11	.43
Damage and Compensation .....	6,326.86	.51
Incidental .....	1,397.04	.12
	<hr/>	
Total Maintenance .....	\$102,799.35	8.33

## Re-construction:

Salaries and Wages .....	\$39,419.68	\$3.19
Rent, Light and Heat .....	768.33	.96
Material .....	44,731.55	3.62
Traveling .....	5,828.15	.48
Total Re-Construction .....	\$90,747.71	\$7.35
Instrument Rental .....	\$30,547.25	\$2.48
Depreciation .....	117,880.99	9.50
Bad Debts .....	5,313.62	.43
Total Expenses .....	\$570,117.03	\$46.21

I also obtained a statement showing the value of the Real Estate owned by the Cumberland Telephone and Telegraph Company in New Orleans, rental for which is charged to the New Orleans Exchange at 7% net, taxes paid, on the valuation given below.

	12-31-06.	12-1-07.
Main Exchange, Poydras and Carondelet Sts., First Dist .....	\$78,517.49	\$78,517.49
Jackson Exchange, Josephine & Carondelet Sts., Fourth Dist. ....	5,466.00	13,961.80
Uptown Exchange, Fourcher & Coliseum Sts., Sixth Dist. ....	20,005.33	20,005.33
Hemlock Exchange, 922 Esplanade Ave., Second Dist .....	14,264.13	14,264.13
Algiers Exchange, Fifth Dist. ....	20,274.28	20,274.28
Warehouse, Howard Ave., First District .....	7,813.30	8,563.52
Total .....	\$146,340.53	\$155,586.55

I have further prepared an estimate showing, as nearly as possible, what the Company's net earnings in New Orleans would have been in 1906, if only legally imposed taxes had been paid to the City; if night tolls had been paid for at day rates, as is now the case, and if the private branch exchange rates temporarily endorsed by the Board of Trade had been in force.

To the saving of \$7,352.33, paid under the "Three Per-Cent Agreement" must be added \$10,044, difference in the gross toll receipts, and \$23,808.96, difference in receipts from private branch exchange subscribers. These figures are furnished by the Cumberland Company with the reservation, however, that the changes now in force have resulted in a reduction of its business. According to the Company's statement "since the abolishment of the night and Sunday rates the number of messages sent between 6 P. M. and 8 A. M. and on Sundays has materially decreased." and that, in so far as private branch exchange subscribers are concerned, it has "lost 14 of these private branch exchanges to date,

with the prospect of losing at least as many more, and, moreover, among the subscribers who have continued their private branch exchange service, there are six so far who have made material reduction in the number of stations and trunk lines and equipment." The Company declares that it will be very much gratified if the increase in revenue under the new scale of charges amounts to \$15,000 per annum on the total number of private branch exchanges in New Orleans.

I have, however, decided to base my calculations on the full amount that would have been received in 1906, if present conditions had then prevailed, and if the "Three Per-Cent Agreement" had not been in force, and I find that the Cumberland Telephone and Telegraph Company's net earnings would have been approximately and as nearly as can be ascertained, \$155,136.07 on a total investment of \$2,781,716, or a net return of a little less than 5.6%.

In the Telephone Report of the Merchants' Association of New York, special consideration is given to what constitutes a reasonable margin of profit for a telephone company, and I beg leave to quote their views on the subject. They say:

"The Telephone business demands a continuous accession of fresh capital to satisfactorily serve the public. Having in view the importance to the public of constant improvement and expansion and the greatest possible efficiency of telephonic service, as well as the necessity of offering an attractive investment to new capital to provide for such expansion, it is the opinion of this committee that to provide a fair return on capital actually and necessarily invested and a proper allowance for contingencies, 10% margin above operating outlays is a reasonable and proper margin in the telephone business. In the various movements hitherto made for the limitation by law of telephone profits, wherever the permissible percentage of profit has been dealt with, this margin has been accepted as a proper one. It has also been specified by law in the case of some other public service corporations."

This conclusion was acceded to by the New York Telephone Company, and I have no hesitancy whatever in endorsing it as just and equitable in the case of the Cumberland Telephone and Telegraph Company here.

It will thus be seen that the return the Cumberland Co. has been receiving in New Orleans is much less than it might reasonably have expected.

#### *Telephone Rates in New Orleans.*

An examination of the rates now in force in New Orleans, authorized by the Railroad Commission of Louisiana, shows that the Company's earnings were based upon the following charges:

##### *Residences.*

Flat rate for unlimited service, Direct Line.....	\$4.50
Flat rate for unlimited service, 2 Party Line.....	3.50
Flat rate for unlimited service, 4 Party Line.....	3.00
Flat rate for unlimited service, 6 Party Line.....	2.50



Measured Service, direct line, 250 calls per quarter, excess calls, 2 cents each.....	4.00
Equitable Rate, direct line, 2 cents per message.....	2.50
Extension Sets .....	1.50

## Professional.

(Includes Physicians, Lawyers, Architects, Engineers, Schools and Convents with School Departments.)

Flat rate for unlimited service, Direct Line.....	\$7.50
Flat rate for unlimited service, 2 Party Line.....	4.50
Flat rate for unlimited service, 4 Party Line.....	3.50
458 Measured Service, direct line, 250 calls per quarter, excess calls, 2 cents each.....	5.50
Extension Sets.....	1.50

## Business.

Flat rate for unlimited service, Direct Line.....	\$10.50
Flat rate for unlimited service, 2 Party Line.....	6.50
Flat rate for unlimited service, 4 Party Line.....	4.50
Flat rate for unlimited service, 6 Party Line.....	3.50
Flat rate for direct line to Long Distance Switch-board.....	5.50
Measured Service, direct line, 250 calls per quarter, excess calls, 2 cents.....	5.50
Extension Sets.....	1.50

## Special Rates.

(Quoted to Clergymen, Churches and Strictly Charitable Institutions.)

Flat rate for unlimited service, Direct Line.....	\$3.50
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## Pay Stations.

(Each station equipped with coin-receiving device, into which the money is deposited for each call. Incoming calls free. The coin boxes emptied about once a month, or oftener, if necessary. If the receipts for local calls at time of each collection are not equal to the amount guaranteed, the subscriber to make up the difference, Fifty per cent of excess above guarantee to be returned to the subscriber.)

Direct Line, 5 cents each call, guarantee of.....	\$7.50
2 Party Line, 5 cents each call, guarantee of.....	4.50
4 Party Line, 5 cents each call, guarantee of.....	4.00
6 Party Line, 5 cents each call, guarantee of.....	3.00

459 Pay Stations are opened in public places without guarantee, at the option of the Company.

All the above rates are subject to a discount of 50c. per month, if paid quarterly, in advance.

There are also in use in New Orleans, 16 Business Blake Tele-

phones at \$8.00 per month and a number of Pay Station telephones at special rates, running all the way from a guarantee of \$1.50 per month up to \$15.00.

Private Branch Exchanges to the number of nearly one hundred are also in existence, and as the Board of Trade has endorsed a new schedule of rates for this class of service, I do not feel justified in re-opening this branch of the subject.

These rates are as follows:

Plan "A"—Unlimited Service.

Switch-board equipped for 20 lines or less, per mo. ....	\$5.50
Switch-board equipped for 21 lines or more, per mo. ....	10.50
Unlimited Trunk Lines, each, per mo. ....	15.50
Telephone instruments in the same building with the switch-board, each, per month. ....	1.50

Telephone instruments located outside of the building in which the switch-board is installed will be charged for as follows:

Within one mile, circuit mileage, of the Private Branch Exchange switch-board, each instrument, per month. ....	6.50
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If the outside instrument is located beyond one mile, circuit mileage, of the said Private Branch Exchange switch-board, \$7.50 per annum will be added to the said rate of \$6.50 for each additional one-fourth mile, or fraction thereof.

460 The minimum rate for outside telephones located in Algiers or Gretna, will be \$13.00 per month each, provided such telephones are not more than one mile, circuit mileage, from the Private Branch Exchange switch-board to which they are directly connected.

If such telephones are beyond one mile, circuit mileage, of the Private Branch Exchange switch board, to which they are directly connected, \$7.50 per annum for each additional one-fourth mile, or fraction thereof, circuit mileage, will be added to the aforesaid minimum rate of \$13.00 per month.

Extension Sets located in the same buildings with the initial inside or outside telephones will be furnished at the rate of per mo., each. ....	\$1.50
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The style of instruments which the telephone company will furnish for use in connection with Private Branch Exchange, may, at the option of the subscriber, be either wall or desk.

The minimum equipment which will be furnished will consist of switch-board, operator's set, necessary battery connections, two unlimited Trunk Lines and three telephones located in the same building with the switch-board.

Private Branch Exchange subscribers on this Plan, that is Plan "A", will be required to take and pay at the aforesaid rate therefor one unlimited talking trunk line for each five or less telephones (counting operator's set as a Telephone), directly connected to the Private Branch Exchange switch-board.

If the aforesaid rates are paid quarterly, in advance, at the office of the Telephone Company, by the tenth day of the first month in each quarter, a discount of 50c. per month will be allowed from each of the above-mentioned rates, except that in the case of outside  
461 telephones, the wire mileage charge is net and the discount will only be allowed from the rate quoted for the telephones.

#### Plan "B"—Limited Service.

Minimum equipment, including switch-board, operator's set, three telephones located in the same building with switch board, two talking Trunk Lines, and 166 $\frac{2}{3}$  outward calls per month, per month \$19.00, less \$3.00 if paid quarterly in advance at the office of the Telephone Company by the tenth day of the first month in each quarter.

Excess outward calls, two cents (2c.) each.

An outward local call, as herein referred to, is a call originating at some telephone directly connected to the Private Branch Exchange switch-board, and destined to some telephone embraced in the New Orleans Exchange service of the Telephone Company and constitutes a consideration of five minutes or less duration.

In-bound calls, calls for telephones which are not answered, calls between telephones directly connected to the Private Branch Exchange switch-board, and calls to the toll or long distance board of the Telephone Company are free.

Each talking trunk line furnished in addition to the first talking trunk line will be charged for at the rate of \$66.00 per annum, and will include, without additional charge, 1,000 outward calls per annum.

The said rate of \$66.00 per annum for additional Trunk Lines may be paid quarterly in advance at the office of the Telephone Co., in which event, a discount of \$1.50 per quarter will be allowed.

462 Telephone instruments located outside of the building in which the switch-board is installed, will be charged for at the rates provided in Plan "A", for such outside stations.

All excess messages are to be paid for each and every month, at the office of the Telephone Company by the tenth day of the month for the month next preceding.

#### Plan "C"—Measured Service.

The subscriber may, at his option, own and maintain, at his own expense, his Private Branch Exchange equipment, in so far as switch-board, instruments, other apparatus, wiring, etc., are concerned, and in this event, the Telephone Company will make connection therewith, provided the equipment installed is substantial and efficient, and is installed according to approved methods and specifications upon the following terms:

The Telephone Company will furnish not less than two talking Trunk Lines, at the rate of \$66.00 per annum each, including 1,000 outward local calls per annum with each line. If payments are made quarterly, in advance, at the office of the Telephone Company

by the tenth day of the first month in each quarter, a discount of \$1.50 per quarter will be allowed from said Trunk Line rate.

Excess calls will be charged for at Two Cents (2c.) each, and payments therefor shall be made as in the case of Plan "B".

Additional Trunk Lines, including 1,000 outward local calls per annum, will be furnished at \$66.00 per annum each. If payments are made quarterly in advance at the office of the Telephone Company by the tenth day of the first month in each quarter, a discount of

\$1.50 per quarter will be allowed from said Trunk Line rate.

463 The above rates offer a wide choice and prospective patrons will have no difficulty in selecting a class of service to suit their individual needs. To the business man, whose use for the telephone does not justify the payment of a flat rate of \$10.00 net per month, one of the measured service or pay station rates will be suitable.

I recommend that the above schedule of rates be endorsed by the Board of Trade, with the following modifications:

1. All rates for party lines on business and professional telephones, or for Blake telephones, should be abolished.

2. All residence rates for four and six Party Lines should be abolished.

3. All measured service rates to be the same for all classes of patrons; this also refers to the equitable rate of so much per month per direct line and two cents for outgoing calls.

I can see no justification for differentiating between the different classes of patrons when it comes to measured service. Surely, the communication made for a business or professional man costs no more to perfect than the call from a private residence. It is repugnant to the very principle of measured service to charge one class of patrons more for the service than is paid by another user.

It is stated by the Company, in defense of the existing discrimination between the different classes of patrons for measured service, that it is only fair that the business man should pay more for his telephone service than is charged to a residence, on the theory that the value of the telephone service to a business man increases in direct ratio to the amount of customers or residences that are connected with him.

This is quite true, and it is clear to my mind that the business man should pay more for the telephone service than the private house-holder, but I maintain that, under the measured rate, this is exactly what will take place. By paying for every message sent, the business man will contribute more heavily towards the expense of the system than the residence, from which only an occasional call is made.

The following table shows the exact number of telephones and subscribers in New Orleans, together with the monthly revenue therefrom, as of date December 22, 1907:

1,321	Business Limited Telephones @ \$5.00.....	\$6,605.00
1,084	Business Direct Unlimited Telephones @ \$10.00..	10,840.00
33	Business Direct Second Line @ \$8.00.....	264.00
7	Business Direct Third Line @ \$7.00.....	49.00

511 Business 2 Party Lines @ \$6.00.....	3,063.00
321 Business 4 Party Lines @ \$4.00.....	1,284.00
215 Business 6 Party Lines @ \$3.00.....	645.00
16 Business Blake Telephones @ \$8.00.....	128.00
158 Professional Limited Telephones @ \$5.00.....	790.00
148 Professional Direct Unlimited @ \$7.00.....	1,033.00
115 Professional 2 Party Lines @ \$4.00.....	460.00
50 Professional 4 Party Lines @ \$3.50.....	175.00
855 Residence Limited Telephones @ \$3.50.....	2,992.50
173 Residence Limited (2c) @ \$2.00.....	346.00
1,528 Residence Direct Unlimited @ \$4.00.....	6,108.00
1,633 Residence 2 Party Lines @ \$3.00.....	4,879.00
469 Residence 4 Party Lines @ \$2.50.....	1,172.50
323 Residence 6 Party Lines @ \$2.00.....	646.00
1,459 Extension Sets @ \$1.00.....	1,459.00
97 Branch Exchanges (2,464 Stations).....	3,259.45
305 No Guarantee Pay Stations,	
2 Guarantee Pay Stations @ \$1.50	
6 Guarantee Pay Stations @ 2.00	
2 Guarantee Pay Stations @ 2.50	

465

82 Guarantee Pay Stations @ 3.00	
42 Guarantee Pay Stations @ 4.00	
478 Guarantee Pay Stations @ 4.50	
4 Guarantee Pay Stations @ 5.00	
5 Guarantee Pay Stations @ 5.50	
1 Guarantee Pay Station @ 6.00	
1 Guarantee Pay Station @ 6.50	
7 Guarantee Pay Stations @ 7.00	
87 Guarantee Pay Stations @ 7.50	
2 Guarantee Pay Stations @ 10.00	
1 Guarantee Pay Station @ 10.75	
1 Guarantee Pay Station @ 15.00	
Total Pay Station Revenue.....	\$4,142.47

Telephones ..... 14,094

Less Extension Sets and Branch Exchange  
Stations ..... 3,923Total Subscribers ..... 10,171

Grand Total Revenue, per month..... \$50,286.92

The Company also has in New Orleans one hundred and fourteen dead-head telephones which are accounted for as follows: Supplied to the City, as legal consideration for franchise and right-of-way, 3; Company's own service, 87; Charity, 8; Given under contracts, 2; Complimentary, 14; Total, 114.

*Telephone Service in New Orleans.*

In order to be able to express an unbiased and reliable opinion on the quality of the telephone service in New Orleans, I made a large number of test calls and timed them by the watch. Out of more than 130 such calls made between 11 A. M. and Noon, at least 50 were unavailing. The average time that it took to get "Central" 466 was in excess of eight seconds; in three cases, it was impossible to get any answer from the operator. Of those connections which were successfully completed at the first call, some took only a few seconds, and others as long as three minutes. Out of eighty-two completed connections, I was given the wrong exchange on six occasions; that is when I would call an "Uptown" number, I would be given "Main" or "Hemlock"; the most frequent error being that I would be connected with the number called for on the exchange from which I was speaking; in other words, the call was not switched. The wrong number was given to me on five occasions.

From actual tests made with the service furnished by the Cumberland Co. in Chattanooga, where I stayed over several hours, and in Nashville, where I spent three days, and from reports and data obtained from other cities, I am in a position to say, most emphatically, that the service in New Orleans is bad.

The first test of the efficiency of the service is the time it takes to get an answer from "Central," and, in this respect, some cities claim to have a three-second service. In Chattanooga, where there are no party lines at all, the average time it takes to get a reply from the operator certainly does not exceed 4 seconds, and the same is true of Nashville. The service here is twice, if not three times, as slow. The number of mistakes made in switching calls from one exchange to another are purely operating weaknesses, as are also the wrong numbers given.

The time it takes to complete a given connection once the operator has answered the call, depends, of course, to a great extent, on the promptitude with which the patron called answers his telephone. In considering this question of service, it must never be lost sight of 467 that the public plays an important role in perfecting telephone connections. Delay in answering rings may cause the operator to tell the party calling that she can get no answer, and when the receiver is ultimately taken off the hook, another operator is signalled and she thinking that a fresh call is being made, queries "number," much to the disgust of the patron, who knows that only a few minutes previously he was "rung up."

But making every possible allowance for the operating force, the fact remains that the service in New Orleans is bad, and must be improved. There are altogether too many "busy" calls; and the service is slow and unreliable.

Taking the number of calls made here per day by the telephone public and the number of connections perfected by the Company, and comparing the same with the results obtained in other cities, it will be seen that throughout the country, the average number of

completed calls varies between 75 and 85 per cent. Some telephone companies claim to connect an even higher percentage, but the results of "peg counts" actually recorded are, on the whole, remarkably uniform.

Pittsburg leads with 89% of calls perfected in summer and 83% in winter. Providence, R. I., offers a very fine example of high-class service, and out of an average of 73,265 calls made daily by subscribers, in September, October and November, 1907, the Company perfected 65,426 connections, or more than 88 per cent.

A number of subscribers, however, are on the measured service basis, and this tends very largely to reduce the number of frivolous calls and facilitates connections.

In Indianapolis, where the Exchange is virtually the same size as in New Orleans out of 170,000 calls, 145,000 connections are perfected daily, by one Company, and the other solemnly affirms that it completes 99% of the calls made.

468 In Kansas City, Mo., where there are nearly 23,000 telephones in use on one system alone, returns show that 175,000 connections are completed out of 200,000 calls.

In Cleveland—where much complaint is made against the service—more than 70% of the calls are connected.

It may be taken that in an exchange of less than 15,000 telephones, as is here, anything less than 75% of perfected connections is open to criticism.

The following are the actual figures recorded by the Cumberland Telephone & Telegraph Company on three special "peg counts," taken for the purposes of this investigation:

## November 2nd, 1907.

	Completed Connections.	Unavailing Calls.
Main Exchange .....	99,517	31,188
Uptown Exchange .....	31,582	11,892
Hemlock Exchange .....	19,169	9,872
Algiers Exchange .....	2,296	863
<b>Total.....</b>	<b>152,564</b>	<b>53,815</b>

## November 4th, 1907.

	Completed Connections.	Unavailing Calls.
Main Exchange .....	112,207	28,120
Uptown Exchange .....	28,561	19,582
Hemlock Exchange .....	17,711	9,983
Algiers Exchange .....	1,810	852
<b>Total.....</b>	<b>160,289</b>	<b>58,547</b>

## November 5th, 1907.

	Completed Connections.	Unavailing Calls.
Main Exchange .....	137,771	45,130
Uptown Exchange .....	21,086	8,948
Hemlock Exchange .....	17,247	11,284
Algiers Exchange .....	1,896	685
<b>Total.....</b>	<b>178,000</b>	<b>66,047</b>



## 469 Grand Total:

Completed Connections .....	490,853
Unavailing Calls .....	178,409
Total Calls.....	669,262

## Private Branch Exchange Peg Counts:

October 29th.

Completed Connections .....	9,184
Unavailing Calls .....	3,084

November 4th.

Completed Connections .....	9,513
Unavailing Calls .....	3,542

*Attitude of the Company Toward the Public.*

It is with the greatest reluctance that I enter upon a discussion of the manner in which the people of New Orleans have been treated by the officials of the Cumberland Company here, but I feel that this report would be woefully incomplete if it did not plainly and truthfully lay bare the evil which has brought about the cleavage now existing between the Telephone Company and its patrons.

Those in authority here never seem to have realized even in the faintest degree that as employees of a public service corporation they were first and foremost servants of the public. On the contrary, they have throughout assumed an arbitrary and dictatorial tone in their dealings with their patrons. They have, at times, been lacking alike in the commonest courtesy as well as in the most ordinary business tact. Too often, when difficulties or differences of opinion have arisen, or when complaints have been made, the replies of the Company have been curt, and, in pecuniary matters, especially, seem to have been limited to threats to cut out the service if the accounts were not settled as dictated by them. Worse than this, these threats have been, in many instances, actually carried out in a manner which is a grave reflection on the intelligence of those responsible.

In order to justify condemnation as strong as that which I feel constrained to express, it is necessary to give specific instances of what I can only term the aberrations of the Company's officials.

One of the leading Banking and Trust Companies in the City was deprived of its telephone service on its refusal to pay 35 cents, which it did not believe to be due. The circumstances were as follows: the Bank's telephone was out of service for 24 hours, and, at the end of the month, the book-keeper, in making out the check to pay the Company's bill, deducted 35 cents. A formal letter was sent by the Company, calling attention to its right to exact the full amount of its monthly bill, and, on the refusal of the Bank to pay the 35 cents—the service was cut out.

In the case of an Attorney-at-Law, who had a party line at his residence, the amount in dispute was \$1.20, represented by ten

days, during which the instrument had been out of commission. This gentleman had abandoned his party line, and had had a direct line installed; yet, on his refusal to pay the amount in dispute for the old party line service, his new direct line, which had just been put in, was taken out.

Cases in which patrons' telephones have been taken out for non-payment of dues, notwithstanding that the bills had been paid in advance, and that not a cent was owing to the Company, can also be cited; and the propensity for cutting out telephones has reached the point where, because a man who had paid for  
471 his telephone in advance decided to rent his house, the first construction gang that passed that way, seeing a rent sign on a house connected with the Company's lines, proceeded to cut the drop wires, without further inquiry or instructions.

This kind of thing has aroused an amount of public feeling that can only be appreciated by those whose task it is to restore order and harmony out of the existing chaos.

The trouble here has been that the local representatives of the Company were not men of the class to which a \$20,000,000 public service corporation, having a local investment of nearly \$3,000,000, might have been expected to intrust its interests. The District Superintendent, although a most excellent Company man, possessed of a thorough knowledge of telephony, and a good disciplinarian, was, to use a common but appropriate expression "spread out too thin." His duties covered the whole of the State of Louisiana and part of Mississippi, and he was not able to devote the attention desirable to the details of the New Orleans business. Despite many qualities, he is not blessed with a superabundance of tact, and, in his dealings with the public, was unfortunate enough to antagonize a large and influential class of patrons.

The Local Manager, a most charming man personally, never began to be big enough for his position, and he was greatly hampered in his work by the fact that the former manager whom he superseded, remained at the head of the Construction Department, and reported directly to the District Superintendent. He was thus virtually cut off from one of the most important branches of his service; and seems never to have had sufficient back-bone to insist on a proper organization of his Exchange.

472 There has also been a general lack of harmony, and this has been reflected in the dealings of the Company's employees with the public. There can be no doubt that the patience of the telephone users in this City has been sorely tried, and that they have, especially of late, been abrupt and impatient with the operators. The girls have become nervous and over-wrought, and, as a result, the service is thoroughly demoralized. From personal observation, I am able to say that there is no comparison possible between the calm, quick, accurate and business-like manner in which the girls in the Chattanooga Exchange plug their calls, and the nervous, jerky, and fumbling way in which the work is done in New Orleans.

That the necessity for an entire re-organization of the business

in New Orleans is fully recognized by the general officers of the Company, may be gathered from the fact that they have placed the best man in their employ in absolute control of the situation here, and that he has already started in to revamp the system from top to bottom. I look upon this as a very great step toward better service, and toward the establishment of the cordial relations which should exist between a public service corporation and its patrons.

Nevertheless, in order to guard against the possible recurrence of the abuses which have marred the conduct of the business here, I think it necessary that there should be proper public control, and, in conclusion, I will examine the different methods whereby existing short-comings may be permanently remedied:

*Regulation by Constituted Authority.*

The respective rights of the City of New Orleans and the Cumberland Telephone and Telegraph Company are very clearly  
473 set forth in the opinion delivered by Judge Fenner, of the Supreme Court of Louisiana, in the case of the City of New Orleans vs. The Great Southern Telephone & Telegraph Company, referred to at the beginning of this report, and in which the grant is rehearsed at length.

Judge Fenner held that "the defendant is the assignee and successor of the New Orleans Telephonic Exchange referred to in the following ordinance of the City of New Orleans, adopted February 18th, 1879:

*An Ordinance Authorizing the Construction and Maintenance of a Telephonic Telegraph Line Through the Streets.*

SEC. 1. Be it ordained by the City Council of the City of New Orleans: That the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city, the lines to be constructed along such streets, at such points, and in such manner as to the kind and position of the telegraph poles, the height of the wires above the streets, and in all other particulars, as the Administrator of the Department of Improvements of this City may direct.

Provided, however, that the said Company shall connect their wires with the Mayor's Office, Chief of Police office, and Fire Alarm and Telegraph Office, and place and keep telephones therein free of charge to the City, so that said telephones may be used in connection with all wires under the control of said Company.

SEC. 2. And be it further ordained, etc., That all the acts and doings of said Company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same."

Continuing, the learned Judge found that:

"Under this ordinance, defendant constructed and has since maintained, telephonic lines through the streets, built according to

the directions of the Administrator of Improvements, and with his approval, and has furnished the City with the free tele-  
 474 phonic service stipulated, and has complied in all respects, with the terms of the ordinance."

And ruled that:

"Upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the City is powerless to set it aside, or to interpolate new and more onerous conditions therein."

In granting the Telephone Company the right to construct and maintain its lines and poles throughout the City, without limitation as to time, and for no other consideration than the furnishing of certain free telephonic facilities to the City, the City very clearly reserved the right in Section 2 of the ordinance to regulate the acts and doings of the Company.

It would seem that, according to both the spirit and the letter of the ordinance, Section 2 reserves not only the right to regulate the location, construction and manner of use of the poles and wires so as to subserve the public comfort and protect the safety of citizens passing and re-passing along the streets of the City, which would be but an exercise of the police power, already, and at all times, vested in the City, but that the aforesaid section also reserved to the City the right to regulate the acts and doings of the Company towards the citizens themselves so as to protect them from abusive or unjust treatment or extortionate charges at the hands of a corporation which alone, and in return for a purely nominal consideration, enjoys special rights and privileges necessary to the operation of a public utility, the service of which is of unquestioned and primordial necessity to the well being of the citizens.

It would be possible to draft regulations which would involve no question of added consideration,—this it is conceded the City has  
 no power to exact—and which would not conflict with the  
 475 ordinance itself, or repeal, alter or destroy it in any of its essential features and considerations.

But in 1898, the people of this State adopted a new Constitution, Article 283 of which creates a Commission, designated as the Railroad Commission of Louisiana, and article 284, declares that "the power and authority is hereby vested in the Commission and it is hereby made its duty to adopt, change or make reasonable and just rates, charges and regulations to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates and telephone and telegraph charges, to correct abuses and prevent extortion and unjust discrimination in the rates for the same, on lines or business done within Louisiana."

Whatever may have been the rights of the City to regulate telephone rates and service by ordinance prior to the constitution of the State Railroad Commission, it is not seriously disputed that the latter body is, at the present moment, the supreme authority for the regulation of telephone rates and charges. Like powers for the reg-

ulation of service will also be vested in it on the passage of the Constitutional Amendments now before the people of this State.

I, therefore, recommend, in order to obtain the proper regulation of telephone rates and service by the duly constituted authority, that the Board of Trade petition his Honor the Mayor, and the Honorable City Council to pass resolutions calling upon the Railroad Commission of Louisiana to promulgate such rules and regulations as your Committee may see fit to recommend.

### Regulation by Competition.

To the examination of this most important branch of my investigation I have devoted much time and study. Although it  
476 is a fact that a competing company—if allowed to enter the field—can undoubtedly build an exchange with say 5,000 subscribers and give a far better service than now exists, at lower rates than the Cumberland Company can profitable charge, I am absolutely opposed to competition.

The telephone is, in its very essence, a means of inter-communication, just as much as the postal service. No community would, for a moment, tolerate a dual postal system under which the letters entrusted to one company could not be delivered to the patrons of its competitor.

A single telephone system promotes general inter-communication. A dual system renders thorough inter-communication impossible. A dual system of telephones divides the population of a city into two camps, and the individual users must either be content with half a service, or must pay, if not a double, at least a greatly increased cost.

Where there are two telephone systems, the business man is almost obliged to take both, and although it is true that in some few cities it is possible to get a measured Bell service and a flat rate independent service for approximately the price formerly paid for the unlimited Bell service, this is only whereby to the great detriment of the service, rates have been cut by both sides to a point where they are no longer profitable.

The same reasons which are urged for the introduction of a second telephone company would apply just as forcibly to the introduction of a third, or fourth. If the arguments of those who advocate a dual system are pushed to their logical conclusion, the more telephone companies a city could boast of the cheaper prices would become, the more perfect the service would be, and the greater the development of the use of the telephone. The mere prospect of half a dozen companies simultaneously enjoying the privilege of tearing up  
477 the streets and planting miniature forests of unsightly poles throughout the residence district reduces this proposition to an absurdity, and yet the inconvenience would only be proportionately greater than that of having a dual system.

An overwhelming majority of cities throughout the United States have tried competition, allured by promises of better service and reduced cost. Out of 212 cities, having a population of 20,000 in-

habitants or more, more than 190 have sought refuge in competition as a remedy for the evils inherent to an unregulated monopoly, but results show that the only advantage that has been derived from competition is an improvement in the service.

Competition does undoubtedly improve the service; both companies strive to please their patrons and are courteous and attentive. Prices are reduced, often to wholly inadequate figures, and the rival companies try, by selling a public utility below cost, to force one another from the field. Thus far, the public appears to be getting the best of it; but from the start the utility of the telephone as a public service is impaired and after the first years, when it is clear that the business is not giving financial returns, fresh capital is impossible to obtain, the very maintenance charges cannot be met, extension is impossible, and "re-organization" ensues. As the struggle has progressed, the service has been getting worse and worse, and the public is made to feel the disadvantages of competition.

It is claimed that the enormous development of the telephone is due primarily to competition, and in support of this contention, figures that are certainly startling are adduced. It is said that "in the 14 years since the original Bell patents expired more than 3,500,000 independent telephones have been installed, or approximately more than 14 times as many as the total number installed by 478 the Bell during the 17 years it enjoyed a monopoly."

I do not know if the foregoing statement is correct, but I submit that even if it is, the recent enormous expansion in the telephone business is due much more to the introduction of the common battery system of operating telephones, and other improvements, than to competition.

Even allowing that competition has been responsible for the increase in the number of telephones in some cities where dual systems exist, I submit that this alleged development is fictitious and in reality hampers genuine and general inter-communication, because so far as the use of the telephone for inter-communicating purposes is concerned one-half of the subscribers in these cities are as absolutely separated from the others as if they were in an entirely different part of the world.

In considering the question, it must not be lost sight of that in order to get at the cost of telephone service under a dual system, it is necessary to add together the rates of the competing companies. Even if an independent company gives lower rates and forces a reduction of existing rates, the aggregate price is the test by which to judge cheapness or otherwise, of the dual system.

Finally, I can see no single advantage claimed for competition which cannot be secured by proper public control. Improvement of service stands out as the most tangible result achieved by competition. Before the Bell companies came under centralized control, the management of each was in a great degree independent and in many cases the responsible officials, lulled into a sense of security by the extent of their monopoly, became indifferent to the public welfare, arrogant, and dictatorial. In such cases, competition undoubtedly



exercised a most salutary influence by compelling a re-  
479 organization of ineffective methods and the introduction of  
improvements which had been long delayed.

In this connection it is fair to point out that the unanimous sentiment of telephone users in New Orleans is that the service was never so satisfactory as when the People's Telephone Company was in existence, and that co-incident with the absorption by the Cumberland of the property of its weaker rival charges were increased and the service altogether deteriorated.

I believe that if after a fair trial of, say, one year after the service conditions herein recommended have been agreed to, it is found that the improvement in the service, which the people of New Orleans have a right to demand, has not been brought about the Board of Trade would be justified AS A VERY LAST RESORT in recommending the granting of a franchise to an independent company.

This, of course, would con-ote the utter failure of the State Railroad Commission to fulfill the duties for which it was created; and as regulation of telephone companies by duly constituted authorities in other states is being successfully achieved, I do not believe it possible that New Orleans will ever be called upon to adopt so disastrous an alternative.

I however, deem it my duty to state very clearly the drawbacks which, to my mind, are inherent to a dual system of telephones, and to this end, I have classified the information gathered as follows:

1st. The immediate disadvantages which would attend the introduction of a competing system here;

2nd. Information concerning the experiences other cities have had with dual systems of telephones;

480 3rd. Expressions of opinion from municipal and other authorities, and investigating committees concerning competition;

4th. Information concerning the methods whereby competing companies have been promoted.

In the first place, if a competing company is given a franchise here, no street in the city would escape being affected by its provisions, which would mean the tearing up of all the business thoroughfares for the laying of underground conduits, and the erection of perhaps twice as many poles as now exist throughout the residence section. I believe this is such a serious proposition that nearly every residence and business house in the whole community would be injured or inconvenienced to say nothing of the loss of time and money due to suspension of traffic. Surely so grave an inconvenience should not be imposed upon the public unless it can be clearly shown that some immediate and corresponding advantage or compensation is to be gained thereby.

Taking the proposition submitted by Mr. Stark as a basis for my discussion, and accepting the figures he gives, that only about 15% of the whole number of telephones of both companies would be duplicated, it will be seen that the present subscribers to the Cumberland Telephone Company who, by the very nature of their business, would be forced to take the telephones of both companies, are



those who now pay \$120 a year for direct line, unlimited service. The added cost of the Stark Telephones, \$72 year, would bring the price of telephone service to them to \$192 a year. It is clear that these subscribers would not, by reason of competition, use their Cumberland Telephones less than they do now, and if they took a measured service rate, the cost to them, as large users, would be even higher than on the flat rate plan.

481 But even taking the average cost of the telephone service proffered by Mr. Stark and assuming that of his first 5,000 subscribers, 2,000 would be business firms at \$72 a year, and 3,000 residence subscribers at \$36 a year, this would give him an aggregate rental of \$260,000 for 5,000 subscribers or an average of \$52 per subscriber as against a present average rental per subscriber to the Cumberland Company, of \$46.87.

Again, taking the cheapest cost of service offered by Mr. Stark, which is his measured service rate of \$20 a year for incoming trunks and three cents for each outgoing call, this compares unfavorably with the existing rate of \$24 a year and two cents per outgoing call, quoted by the Cumberland Company. It cannot be disputed that the introduction of a competing company in New Orleans offers no advantage in so far as telephone rates are concerned.

Mr. Stark claims that "competition is the force that extends and widens the service" and in support of this he uses the argument that competition has had its share in the development from 500,000 telephones in use in 1899 to about 6,000,000 to-day. As I have already stated, this development, in my opinion was due more to the introduction of improvements, which have made the telephone the great public utility it is to-day.

In laying stress upon the fact that New Orleans, with a population of 350,000 has only 13,000 telephones in use—the correct figure by the way, is nearer 15,000—an effort is being made to prove the necessity for competition.

The reasons which tend to lower the percentage of telephones to population in this city are four in number. First, no inconsiderable proportion of the inhabitants are negroes. Second, there is a large French speaking population which is extremely con-

482 servative and has not taken kindly to the telephone; Third, the quality of the service given in New Orleans, and the treatment accorded to the public in the past has not been such as to induce people to pay for the telephone unless they had to; Fourth, the fact that every new subscriber added means the introduction of fresh capital, coupled with the unsatisfactory relations which have existed between the company and its patrons, has deterred the company from making any very violent effort to more thoroughly develop its business here and for some time past virtually no canvassing has been done.

Another argument used by Mr. Stark is, that where unlimited service is given at flat rates, the number of times per day that each telephone is used is three times as many as where the measured rates prevail, and he asks which telephone is worth most, the much used or the little used one. He seems to lose sight of the fact that

the number of messages handled per day on a given exchange is the controlling factor in the cost of operation and I submit that it is indisputably of greater advantage to talk over the telephone when necessary to three times as many people as could be conversed with if the lines were loaded, as in the case with the unlimited service, by frivolous and unduly prolonged conversations.

In support of competition, the testimony of a number of gentlemen who have written letters commending telephone competition is adduced. Whether any or all of these writers are interested in independent companies or not, is not stated, but I do not think that much weight should be attached to merely individual expressions of opinion, unless it can be shown that they are the result of pains-taking investigation.

Mr. Stark also quotes from the report of Mr. Harry P. Nichols to the Board of Estimates and Apportionment of New York, 483 which he describes as "the most reliable and exhaustive investigation into the telephone situation ever made in the United States \* \* \* and by experts sent in person into thirty-six cities."

While desirous of giving Mr. Nicholls due credit for the manner in which he fulfilled his task, it is impossible to compare the investigation referred to with that conducted by the Special Committee of the Chicago City Council which decided against competition, or with the inquiry made by the Merchants' Association of New York, the findings of which were diametrically opposed to the conclusions arrived at by Mr. Nicholls.

It is not exact to say that Mr. Nicholls' report is based upon the findings of telephone experts. The fact is, that during the summer vacation of 1906, "several employees of the Bureau of Franchises of the City of New York visited thirty-six cities of the United States," their aim being while making inquiries relative to the so-called Bell and Independent telephone companies to obtain such data "as would perhaps aid in the final determination as to whether a second telephone company should be allowed in New York City."

One of the reasons for which a competing company here would be a burden rather than a relief to the business community is, that the business man who must have long distance connections could not dispense with the existing Cumberland service however great the advantages offered by the competing company. Just as the storekeepers telephone increases in value as more and more residence subscribers—that is customers—are connected with an exchange; so the value of a telephone service to a city like New Orleans increases as the number of outlying communities connected with the central exchange by long distance lines grows. Every long distance line radiating from the city is a feeder to its commercial prosperity. Of course, if a dual system were *per se* 484 a good and necessary thing to have, the absence of long distance connections would not be an insuperable barrier to its introduction.

Before abandoning the discussion of the disadvantages of telephone competition it may not be amiss to point out how bad a thing

it would be for the business credit of this city if, as the result of the adoption of a dual system, a rate war ensued and either, or both, of the competing companies were forced into bankruptcy. The failure of a public service corporation which has invested millions of dollars in a city is a possibility not to be lightly disregarded.

In this connection it is interesting to examine the experiences of other cities which have been burdened with a dual system. Even taking those places put forward by the advocates of competition as demonstrating the advantages derived from having two companies, an examination of the facts shows that there is no justification for optimism.

Mr. Stark cites St. Louis, Cleveland, Buffalo, Pittsburg, Louisville, Kansas City, Indianapolis, Rochester, Toledo, Columbus and Albany; and I beg to submit facts concerning the status of telephone competition in these various cities:

### *St. Louis.*

St. Louis has a dual system, one of the companies being the Bell Company of Missouri, the other, organized some eight years ago, the Kinloch Telephone Company, which is generally considered one of the best and most conservatively managed independent companies.

At the outset the Kinloch rates were \$60 for business and \$36 for residence service. Within five years the independent company advanced its rates to \$72 a year for business, and \$48 a year for residence. There is no question but that service has been greatly improved since the advent of the Kinloch and there has also been a reduction in the rates of the Bell Company of Missouri, but here, as elsewhere, this has resulted in an increase in cost to the business man who is obliged to have both phones, and in the division of the residence section of the city into two camps between which there is no telephonic communication possible.

I am very doubtful whether the Kinloch Company is in a really satisfactory financial position. It passed its last dividend, and is not now doing any construction work. Its financial history has some peculiar chapters. In August, 1898, it authorized a mortgage or deed of trust for \$2,000.00 on its plant. In 1905, it became absolutely necessary to provide new switch-boards, shaft, cables, central and exchange equipment, etc. In other words, about \$1,000,000 worth of its plant needed to be reconstructed, and this amount should have been put aside every year out of earnings, as a depreciation fund. But this had not been done and to secure the money needed to reconstruct a goodly portion of its plant, which was already mortgaged for \$2,000,000, it was necessary to resort to desperate financiering. Mr. Edwin F. Carter thus describes the manner in which the \$1,000,000 was obtained:

"The Kinloch Long Distance Telephone Company, owned by practically the same individual interests as the Kinloch Telephone Company, acquired the stock of the Kinloch Telephone Company, giving as a reason therefor, that the Kinloch Telephone Company

was a valuable addition to the assets of their Company. Bear in mind that at the time the Kinloch Telephone Company was considered a desirable acquisition, it was mortgaged for \$2,000,000, its entire sub-station equipment and central office equipment in a district, which contained about 10,000 of their total 16,000 subscribers, was obsolete and practically without value; furthermore, it  
486 was deemed necessary to replace all of this equipment at an estimated cost of \$1,000,000, and for this proposed expenditure there were then no funds available.

Nevertheless, the Kinloch Long Distance Company traded their stock, share for share, for the stock of the Kinloch Telephone Company.

"The Kinloch Long Distance Telephone Company had, on January 1, 1904, authorized a \$5,000,000 deed of trust on its property then owned and thereafter acquired. Only \$500,000 of the bonds secured by this mortgage had been issued and the indenture provided for the issuance of bonds from time to time for the purpose of adding to and improving the property of the Company. Here the reason for the absorption of the Kinloch became apparent. The bonds of the Kinloch Long Distance Telephone Company were to provide the greatly needed \$1,000,000.

"The above requires considerable thought and attention for one to estimate just what might result from such proceedings. The directors of the Kinloch Long Distance Telephone company have said that they intend to charge 'construction and equipment,' their principal and almost only asset, with the cost of two large switchboards, and with the cost of a double set of subscribers' instruments in their main district, together with the cost of installing both old and new equipment and removing the old, when in reality there exists only the new equipment, the old equipment having become salvage. They have gone farther than this auditing. They have mortgaged the assets of their Company for more than \$4,000,000, and are representing the value of those assets far in excess of what would be given them by proper auditing. They have replaced part of the property which already carried a mortgage of \$2,000,000 with money which has no better security than a second mortgage on that property. The holder of the bonds of the Kinloch Telephone Company does not suffer, as his property has been rebuilt, but what about the holder of the bonds of the Kinloch Long Distance Telephone Company.

"It is evident from the 1906 condensed statement of the Kinloch Long Distance Telephone Company, that proper auditing would have shown a very large deficit for that year. The earnings and expenses of the Kinloch Telephone Company are included in this statement, and it was in the year of 1903 that the new switch-board and sub-station apparatus was installed in their 'Central' district, this work having been completed the latter part of that  
487 year. The statement, condensed, follows:

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY 283

Gross Revenue.....		\$990,174.54
Operating Expenses.....	\$325,024.02	
Maintenance .....	197,630.38	522,684.40
Net Earnings.....		\$467,490.18
Fixed Charges:		
Interest .....	\$227,086.00	
Taxes .....	52,836.74	\$279,922.74
Net Profit.....		\$187,567.44
Dividend, 5 per cent. ....		121,845.00
Surplus .....		\$65,722.44

"No one can deny that if the construction value of the plant was charged with the cost of new equipment installed that year, it should have been credited with original cost of plant replaced (including cost of installation). Maintenance should have been charged with all plant replaced, together with the cost of installing and removing old plant, and should then have been credited with the marketable value of the equipment thrown out of service. This would have added \$500,000 or more to the maintenance account, and would properly show a deficit for 1903 of over \$400,000."

*Cleveland.*

Cleveland first tried a dual telephone system in 1897, when a franchise was granted to the Home Telephone Company, the rates for service being fixed by ordinance at \$48 for direct line business, and \$36 for direct line residence. The Home Company was a failure and the Cuyahoga Telephone Company was organized and took over the property of the Home Company, and an assignment of its ordinance contract with the city.

Early in 1902 the Cuyahoga enterprise was admittedly on the brink of ruin. As a means of creating a larger income, which was the only way out of its difficulties, the company appealed to the Cleveland City Government to repeal its franchise limiting its maximum rates. In his application, the Manager of the Company stated that unless the rates were raised it would be necessary to amalgamate with the Bell Company, or go out of business entirely, and in reply, Mayor Tom Johnson said: "I believe that this consolidation of the telephone companies would be a good thing for the people. This business is unlike almost any other in this respect. The two telephone companies in the same city are an absolute nuisance, and their consolidation would be a great accommodation to the public." This statement was entirely endorsed by Senator Mark Hanna, who stated emphatically, that "competition in Cleveland was a nuisance."

At the suit of the Cuyahoga Company the Supreme Court of Ohio held that under the statutes of the State, the limitation as to

rates was void, and on the strength of this decision, the Independent Company increased its rate to \$72 a year, direct line business, and \$48 a year, direct line residence. This new rate schedule was put into effect in April, 1904, and in the summer of 1906 the Cuyahoga Company added another \$4 per annum to each of the above rates.

The Cuyahoga Company has about 23,000 telephones in the county of Cuyahoga, and the Cleveland Bell Company about 32,000 instruments in the same territory. By taking the flat rate of the Cleveland Company for direct line business service which is \$84 a year, and adding to it the direct line business rate of the Cuyahoga, namely, \$76, it will be seen that business men who must take both services are paying \$160 a year.

489 There is not the slightest doubt that one company in Cleveland could furnish the city with all the service it requires at less than the aggregate of the charges of the two existing companies. The Cleveland Telephone Company has a capital of \$3,100,000, on which it earned last year, less than 5%. It has no bonds. The Cuyahoga Company had, on the 1st of January, 1907, \$1,500,000 of common stock issued \$1,323,600 preferred stock issued, and \$2,700,000 of bonds issued, making, at that time a capitalization of \$5,523,600. Since then, the Company has issued a further amount of preferred stock and bonds, and its capitalization is now probably in excess of \$6,000,000.

Complaints as to the poor quality of its service led the Cuyahoga Company in October last to decide to install the Clement Automannual, but the month following, its directors decided to virtually suspend development work, owing to the impossibility of attracting the fresh capital necessary.

### *Buffalo.*

In 1903, the Frontier Telephone Company was built in opposition to the Bell Telephone Company, of Buffalo, and affords a fine example of over-capitalization. It has never, however, raised its rates, which are fixed by an iron-clad ordinance, but it is noteworthy that although the ordinance specifies that the company is to pay to the city 3% on its yearly earnings, it has always refused to comply with this section on the ground that its rates are so low that compliance with this clause would mean bankruptcy.

This company refused information as to the amount it writes off annually for depreciation and I very much doubt whether any provision at all is being made by it for the reconstruction of its  
490 plant. If this is the case, it is clear that whatever money has been paid by it has not been legitimately earned as a profit, but is money that should have been put aside to care for reconstruction, the need for which must soon make itself felt.

The Frontier Telephone Company is capitalized as follows:

Capital Stock .....	\$3,000,000.00
Bonds .....	2,500,000.00
Total .....	5,500,000.00



The number of telephones operated by the Company is 16,215, whereas the Bell Company of Buffalo operates nearly 50,000 telephones in its territory and is capitalized at \$3,700,000—all in capital stock—no bonds having ever been issued.

The Bell rates in Buffalo are nearly all on the measured basis and have been so since 1902. The Company claims that its net earnings per telephone have been reduced 30% in the last five years owing to increased cost of operating, maintenance, etc.

### *Pittsburg.*

Why anyone should quote Pittsburg as an illustration of the advantages of competition is a mystery to me. There has been no reduction in rates, due to competition; the service of the Bell is notably superior to the service of the Independent Company; the Bell Company is prosperous, the Independent Company is not; and it can be clearly proved that the business men of Pittsburg have to pay about \$350,000 a year to be burdened with a nuisance.

The Bell Company has a business rate of \$120 per annum and a residence rate of \$100, also measured rates which bring 491 telephone service to within the reach of nearly 10,000 subscribers. In Pittsburg alone, not counting Allegheny, there are 22,177 Bell subscribers using 32,926 telephones. The time it takes to get "central" is, on an average, four seconds; 163,031 calls are made by subscribers daily and the company perfects 150,490 connections. The Company for the whole of its territory has a capitalization of \$13,000,000—no bonds—on which it pays 8%.

The Independent Company—the Pittsburg and Allegheny Telephone Company, has not furnished me with the information I requested of it. But this much I know. It was chartered in April, 1898. In its reports made to the State of Pennsylvania for 1903 and 1904, its total receipts and expenses are, curiously enough, given as being exactly the same, \$382,226.53 in 1903 and \$413,212.34 in 1904. Its capital stock is \$1,000,000. It has a funded debt of \$1,400,000 and other liabilities of approximately \$350,000. Of its capitalization the \$2,000,000 of common stock represents no cash paid in; its capitalization is water to that extent. It is paying no dividends on its common stock. This Independent Company had on August 1st, 1905, little less than 12,000 stations and has probably not far from that number now.

In Pittsburg there are about 5,200 duplicate telephones. The Independent Company's charges are, \$72 for business, and \$36 for residence. As 4,900 out of the 5,200 duplicate telephones are business telephones, it follows that the Pittsburg business community is paying about \$350,000 annually for this double service, more than it would pay if the Bell Company should take on the Independent Company's subscribers without any increase of rates.

### *Louisville, Ky.*

Louisville, Kentucky, is of interest as affording proof that competition does not reduce telephone rates, and as showing how some



competing companies have been organized. The Louisville Home Telephone Company was organized in 1898 to "save the people from exorbitant charges" made by the Cumberland Company. Capitalists from Ohio interested some local Louisville merchants in their venture and secured a franchise in which the following maximum rates were fixed:

Business direct line, \$4.00 per month in the city limits. Beyond the city limits and for each mile or fraction of a mile, 50 cents per month additional.

Residence within one mile of their exchange, \$2.00 per month. Over one mile and within two miles \$2.50 per month. Over two miles and within the city limits \$3.00 per month.

All bills net, payable quarterly in advance without discount. All lines to be direct lines and no pay stations to be installed except at hotels and depots.

They were also to pay to the city of Louisville, in addition to the original price of the franchise, \$1.00 per year, as a special tax for each telephone over 6000 in the city limits. This sum was payable semi-annually.

The Company was organized by issuing \$1,350,000 of 5% bonds, interest payable semi-annually, and an equal amount of stock was issued to be given as a bonus to all those who purchased bonds. The usual sale was \$1,200 worth of bonds with which \$1,200 worth of stock was thrown in free, for \$1,000.

493 On this basis they were organized and set to work through a construction company formed by the original promoters to build the plant.

They put a very low grade of underground construction in the business district, and of late, this has given them serious trouble. Their pole construction was good but the entire plant could have been duplicated, including the building and all for \$750,000.

Before the company was formed or the plant was completed, the promoters made about 3000 five-year contracts at the above rates. They began operations in 1901 or 1902, and now have about 7500 telephones.

They at first gave very good service, contenting themselves with a full development of the city proper. They have made no effort to develop the suburban business, and in this, the value of their service has been greatly reduced.

After the plant was constructed they paid little attention to maintenance of it, putting aside virtually nothing for reconstruction work. At the present time deterioration has worked havoc with their plant, and in a great many parts of the city they are unable to put on additional subscribers for the reason that their routes are full, and they state that they are unable to secure money for increasing the facilities. Last summer they made a determined effort to secure a new franchise, taking off the restriction as to the rates, but failed. During this time the President of the Home Company, Mr. C. R. Bickel, came out with a sworn statement, on the front page of the Courier Journal, stating that they could not continue the business at existing rates, that they could not secure additional capital with

which to prosecute their business. They have paid interest on their bonds, and for some time a dividend on their stock by taking money that should have been used for reconstruction purposes. Of  
 494 course, the stock represents even less than water, in as much as the plant was bonded for at least half a million dollars more than it cost to build it. At the present time, the Home Company takes the position that the high prices of material and the rates they are getting will not justify them putting in more telephones.

Since the Home Telephone Company started in Louisville, the Cumberland subscription list has increased from 3500 telephones to 11,000 telephones and, notwithstanding the presence of competition, an increase in rates was recently unanimously approved by the Board of Directors of the Board of Trade of Louisville; the direct line business rate being increased from \$6.50 to \$8.00, and the direct line residence from \$2.50 to \$4.00.

That the addition of another company has improved the service cannot be questioned. Here, very clearly the two companies are dividing the load between themselves, for which the subscriber is paying the freight. It has not been found by the business people of Louisville that they could dispense with either telephone; therefore, they are forced to pay \$12.00 for what they could otherwise get for \$8.00, and there is also forced upon them the additional inconvenience of having two telephones on their desk, two bells to become confused with, etc.

As stated above, the Home Telephone Company attempted to pay 4% dividends, 1% payable quarterly, but they have declared two, and I have some doubts as to whether either of them were paid. They were forced to pass the stock dividend for the last four quarters.

### *Kansas City, Mo.*

The present status of competition in Kansas City, Mo., is well shown by the following extract from the Kansas City Star, of November 21st, 1907:

495 "The Kansas City Home Telephone Company has recently in some cases declined to put in telephones at places in the outside wards. In one case where it was insisted that the franchise required it, a telephone finally was installed. An officer of the company said to-day: "We are situated like other people. We cannot borrow money. Laborers have to be paid. Poles cost more money every year, and wire is expensive. The only causes in which we have declined to accept new contracts have been causes where it meant getting out a good many poles and stringing miles of wire. Under the present financial conditions, it does not pay us to spend \$150 to get one new subscriber. Our switch-boards have the capacity for large additions to our present plant, but we have been compelled to hold back on extensions. We took off our solicitors several months ago, but we are putting in new telephones every day in territory that we can reach."

But all through Missouri and Kansas, the experience with the dual system has been a bitter one.

On the expiration of the Bell Patents, the manufacturers of telephone equipment urged promoters to invade this territory and secure franchises on the theory of cutting the rates of the existing Bell exchanges. At one time the Bell telephones in this territory were only about 10% of the whole. The other 90% were in the service on the basis of rates decidedly lower than the Bell rates. These rates for a time seemed to yield a satisfactory profit, but only for a time. As soon as the period for renewal and reconstruction and expansion came, the Independent companies found themselves compelled to raise rates or go into bankruptcy.

As financial assistance was not forthcoming from other quarters something like fifty of the more important independent properties were absorbed by the Missouri and Kansas Company, so now the Bell system includes more than half of the telephones in the territory.

Rates have been steadily increasing, but despite this fact, the business has not been profitable. As far as the Missouri and  
496 Kansas Company, is concerned, it paid a moderate dividend until about three years ago, but this it was only able to do by reason of its toll revenues, its exchange earnings never having been profitable. The company is now operating along the closest lines of economy consistent with giving first class service, but so far has not been able to earn even its operating expenses; and payment of dividends has been stopped.

Most of the independent companies have arrived at the inevitable reconstruction period and are facing either absorption by the Bell Company, or the sacrifice of their property to outsiders who can be induced to furnish new money, or court receiverships.

### *Indianapolis.*

The Central Union Company operates through Ohio, Indiana and Illinois and its operating headquarters have been in Indianapolis, Indiana, since the 1st of July, 1903. The Company ceased paying dividends on the 1st of April, 1895, because at the rates it was then charging for service, it was found that the payment of dividends was taking money which property should have been put into maintenance of plant and without this maintenance it could not fulfill its duty to the public.

The rates in Indianapolis at that time were \$72 for direct line business service and \$48 for direct line residence service.

In 1897, a competing company was organized, called the New Telephone Company with rates fixed by ordinance at \$40 for unlimited business service and \$24 for residence service. The New Telephone Company's property was subsequently leased to another  
497 corporation organized purely for the purpose of increasing the capitalization to be placed upon the plant and was called the Indiana Telephone Company.

The service of the Central Union Company was at that time bad owing in great measure to the poor condition of its plant, which had been entirely re-built. It put in force a flat rate of \$54 for direct line business service and \$24 for direct line residence service, and at the present moment, both Companies in Indianapolis are operating

at a financial loss, while the public is paying more for the use of both systems than it formerly paid for one.

The Indianapolis Telephone Company and its predecessor lost money from the start and something over a year ago its lessor, the New Telephone Company made application to the city authorities for the right to raise the rates and at public meetings, both before the Board of Public Works and at a meeting held in Tomlinson hall, to which the public was invited, declared that it was practically bankrupt and that it could not at the rates laid down in the ordinance provide sufficient money for the operation and maintenance of its plant, without regard to interest on its debts and future payment of the same.

Unless the city comes to the rescue of the Indianapolis Telephone Company and permits it to charge a sum in excess of the present rates, bankruptcy of that concern must follow very soon. As to the Central Union Company, which has completed its new plant and is now giving the public a very fine service, it also must raise its rates if its obligations to its shareholders are to be met.

### *Rochester.*

A competitive company was organized in Rochester in 1900 called the Rochester Telephone Company. The capital stock was 498 \$486,000 and bonds were issued to the amount of \$379,500.

Two years ago it was absorbed into the United States Independent Telephone Company a corporation with a capital stock of \$50,000,000 and an authorized bond issue of \$25,000,000. It retained its original name but was entirely controlled by the "big" company, which is to be sold on February 4th, of this year, to the highest bidder by a committee having charge of its affairs.

The Rochester Telephone Company has notified its subscribers of a raise in rates as from the first of this year, from \$48 direct line business to \$60, and from \$30 direct line residence to \$36, for the reason that its former rates, fixed by ordinance (the terms of which by the way are being ignored), are inadequate for proper returns on the investment.

This has created much opposition, as the sentiment of the business community in Rochester for some time has been opposed to competition. When the Hamilton Committee visited the city, it reported:

"The experience as expressed by the business community (Rochester) here, is that they must install both systems and that the cost to business men is considerably more than it was under one system, although some business men say that the effect has been to make the service much better. There are very few in favor of competition; most business people express themselves that it is not to be desired, one company service being much better, provided the service is good."

The United States Independent Telephone Company, with its enormous capitalization, was listed on the Rochester exchange about two years ago and its stock began to sell round 40 and as high as 50.

Bonds were also listed and sold at the same place at a little above 80 for about eight or ten months when both the stock and the bonds began to drop until the stock went to 3 and the bonds to 40 with no buyers.

499 This United States Company is one of the most notable failures in the Independent telephone business. The stockholders have lost every dollar which they paid for the stock; in short, the stock has been wiped out of existence without any reimbursement to the purchasers thereof and the bondholders stand to receive \$200 on each \$1,000 bond purchased, and this only in the event that a re-organization of the plant can be agreed upon by the members of it. The holder of each bond will be required to purchase bonds of the denomination of \$500 in re-organizing the Company before such purchasers, original holders of \$1,000 bonds, may receive \$200 for each such \$1000 bond.

### *Toledo.*

Toledo, Ohio, affords a very clear instance of rate raising. In July, 1901, the Toledo Home Telephone Company obtained a franchise to build and operate a telephone plant in Toledo. This franchise was granted by the Probate Court before which the then existing telephone rate of \$78 for business and \$42 for residence had been attacked as exhorbitant. One of the stipulations of the franchise was that the new company's rates should not exceed \$40 per annum for business, and \$24 per annum for residence service.

Early in 1903, a year and a half after the franchise had been granted, the Toledo Home Telephone Company was forced to make application to the Probate Court for a modification of its charter. In its petition it averred that the existing rates were too low, and that financial disaster would follow unless it was given permission to raise its rates. It asked to be allowed to charge as high as \$80 for business and \$50 for residence telephones which was higher than the then existing Bell rates. The Probate Court denied this application, but a year later the company raised its rates in absolute violation of the conditions of its franchise.

500 The city of Toledo brought suit to enjoin the company from making these new rates but in 1905 the Supreme Court of Ohio held that the Probate Court had no right to fix telephone rates in a franchise. This legal victory of the competing company resulted in much stock speculation out of which promoters profited very largely.

Sentiment among the business men of Toledo was very forcibly expressed to the visiting alderman of Hamilton, Ont., who reported: "The business men whom we approached in Toledo were not favorably impressed with competition, owing to the fact that it materially increases their rates, and was expressed by many of them to be a nuisance in operation."

As to the manner in which the competing company in Toledo was organized, the following may prove of interest. The plant was built by the Central Construction Company, which issued a prospectus, wherein it set forth that the proposed telephone company's plant is to "cost about the sum of \$650,000 in cash."

"The system will be constructed and completed with about 5,000 telephones connected, and with an ultimate capacity of from 8,000 to 10,000 telephones." Further, "that allowing \$25,000 in bonds and \$25,000 in stock, to the construction company for the franchise, and \$15,000 of bonds \$15,000 of stock for contracts heretofore secured, there will be left a profit of at least 30% in bonds and 30% in stock over the cash cost, to be divided one-half to the construction company and one-half to the parties furnishing the funds representing the cash cost, pro-rated to the amount of money furnished by each."

"On the estimated cost of \$650,000 in cash and a profit of 30%, the amount of securities, issued by the Home Telephone Company will be as follows:

	Bonds.	Stock.
501 Amount of bonds to parties furnishing funds .....	\$650,000	
Amount of stock to parties furnishing funds .....		\$650,000
Amount of bonds for franchise .....	25,000	
Amount of stock for franchise .....		25,000
Amount of bonds for contracts and preliminary expenses .....	15,000	
Amount of stocks for contracts and preliminary expenses .....		15,000
15 per cent of cash cost in bonds to the Central Construction Co. ....	97,500	
15 per cent of cash cost in stock to the Central Construction Co. ....		97,500
15 per cent of cash cost in bonds to parties furnishing funds .....	97,500	
15 per cent of cash cost in stock to parties furnishing funds .....		97,500
Total .....	\$885,000	\$885,000

The prospectus further sets forth: "The capital stock of the Toledo Home Telephone Company shall first be increased to \$2,500,000. The bonds shall exempt all stockholders' liability."

In other words, the investors who were to furnish the cash, were to receive \$650,000 in bonds, and a bonus of stock in like amount. These bonds were sold at 85 or 87½. If sold at 87½, the \$650,000 produced \$568,750 in cash. This telephone company, then, at the outset, issued \$1,770,000 of stocks and bonds, receiving therefor only \$568,750 in cash and its franchise and certain preliminary expenses. The cash represents about 31% of the stock and bonds outstanding.

#### *Columbus.*

The Citizens Telephone Company of Columbus, Ohio, is another instance of a company which entered into a solemn agreement with the city that gave it its franchise, and now seeks to repudiate its pledge, because it has ascertained that under the law, municipalities in Ohio cannot regulate telephone rates.



Curiously enough, its attempt to increase rates was almost coincident with its adoption of the automatic system, which is said to reduce rather than to increase the cost of operation.

Formerly the Citizens Telephone Company operated a manual common battery exchange of a maximum capacity of 5200 subscribers. The board at first gave good service to about 3,000 subscribers, but the number of its patrons increased till the capacity of the board was reached. Most of the construction had greatly degenerated, and in 1904, it was found necessary to reconstruct and install a new plant. The present automatic exchange is said to be one of the finest in the country, and taken as a whole, the company appears to have been prudently and well managed. Certainly its development justifies the increase in rates now contemplated, but the fact only shows how fallacious is the argument that competition cheapens cost of service.

The people of Columbus, however, are very outspoken in condemning the increased cost, and they seem to consider the dual system a nuisance. In Columbus it certainly has had no other advantage than an improvement in the service.

### *Albany.*

The Albany Home Telephone Company has now been operating for about seven years, and has thus far neither increased its rates, nor had any serious financial trouble. Its capital stock is \$500,000,

of which \$350,000 has been sold, bringing in \$298,300, and 503 it has bonds outstanding to the amount of \$347,000. It appears to have been very prudently managed. At first it paid no dividends at all, but for the last two years has paid 4% in quarterly installments of 1%. Its advent has greatly improved telephone service in Albany, and it claims to have nearly five thousand telephones in use. Its direct line business rate is \$48, and direct line residence rate, \$24.

The Hudson River (Bell) Telephone Company's rates have not been much reduced by the competition, except for residence telephones. Here the rate has been cut from \$72 to \$48. The business rate still remains at \$90, and there is considerable complaint among business men that they are forced to pay \$138 a year for telephone service, which one company could undoubtedly furnish in a more convenient manner than the two competing systems. The Hudson River Company operates more than 30,000 telephones in its entire territory and has more than 8,000 in Albany, itself. Its capital stock is about \$4,000,000, with nearly \$3,000,000 bonds outstanding.

### *Opinions on Competition.*

The experiences of the cities put forward as illustrative of the advantages of a dual system of telephones have been repeated in virtually every city in which competition has been in force long enough to enable the inevitable claims of reconstruction to make themselves felt.

A careful study of the facts as herein set out has led the follow-



ing authorities—among countless others—to express themselves in no uncertain tones anent the disadvantages of telephone competition.

Mr. Linn H. Young, to whom Mayor Busse of Chicago handed my letter of inquiry for reply, was chairman of the Committee which in last November decided the telephone question in Chicago. He has probably had access to more and better telephone information than any living man not connected with the industry itself, and his opinion must of necessity carry very great weight.

He writes:

"I am chairman of the Committee which spent about two years in investigating the telephone question, which has recently been settled in this city. I do not know of any advantages in a dual system and the disadvantages are many. What you want is one system with proper public control. I sincerely hope New Orleans will not find itself the victim of a double telephone system."

The Massachusetts Highway Commission, in the hands of which is placed the supervision of the telephone and telegraph companies doing business in Massachusetts, directed their Secretary to convey to the New Orleans Board of Trade, that, in their opinion, a dual system of telephones, in any community, is not only unsatisfactory but is a drawback to that community.

A Committee of the Connecticut Legislature reporting on a bill to amend the statutes regarding Public Service Corporations so as to permit unrestricted telephone competition, upheld the principle of restricting competition in public utilities and especially condemned telephone competition as opposed to public interest.

The Special Telephone Committee of the Cincinnati City Council in explaining the disadvantages of a dual system said:

"It has been shown that a single system can perform the desired service much more efficiently and at less aggregate cost than two systems can. It is obvious that two systems involve extensive duplication of plant and organization, which entails a heavy additional burden of fixed charges and operating expenses, much of which would be unnecessary if the service were performed by a single system. This duplicated outlay being in excess of the amount really necessary to perform the service, is an economic waste. In telephone operation no compensatory benefits to users in the form of lessor cost of service or increased efficiency have yet developed to justify this waste. The dangers coming from it are easily seen. Unless it is provided for in the charges exacted from consumers the capital investment will be gradually eaten up. In the meantime, as abundant experience in railroad competition has shown, equipment will be permitted to deteriorate."

In his veto message to the Board of Aldermen, which had granted a franchise to the Metropolitan Home Telephone Company, the Hon. Jno. F. Fitzgerald, Mayor of Boston, lays great stress upon the serious consequences of a general tearing up of the streets of a city within the districts where wires are required to be placed underground. He wrote in part:

"The damage to our street pavements will certainly amount to

hundreds of thousands of dollars. Experience has fully shown that even when sufficient bonds are given it is practically impossible for the city to get its street surfaces, when once they have been opened, fully restored to their original condition. Only a great and undoubted benefit to the community could warrant the serious damage to the streets and the inconvenience to the public involved in a duplication of the present telephone wires, both above and below the ground."

Continuing he states:

"Such information as I have thus far been able to obtain leads me to the conviction that the telephone question is emphatically a local one, and that it should be dealt with according to the conditions existing in each municipality. The question for us is not what conditions were, or are, in Chicago, St. Louis or Philadelphia, but what they are in Boston. Where the State does not undertake, as it does in this Commonwealth, to supervise the telephone corporations or to regulate its rates, then the public are dependent for good service at fair rates either upon the enlightened self interest of the telephone company or upon the introduction of competition. It is

obvious that with the same rates and service a single system of say 100,000 subscribers is of vastly more public convenience than two systems having in the aggregate 100,000 subscribers but divided into two groups who cannot communicate with each other. Competition should therefore be introduced only where it is the sole means of securing relief from unreasonable rates and poor service."

In 1902 the Council of the City of Hamilton, Ont., appointed four Aldermen as a Committee to visit cities having two telephone services, and to report generally on competition in telephony and the proposed introduction of competition into the City of Hamilton. The Committee personally visited Grand Rapids, Detroit, Toledo, Cleveland, Pittsburg, Rochester and Buffalo and communicated by letter with the city authorities of St. Paul, Minneapolis, Adrian, Fall River, New Bedford, Pierce, Augusta, Des Moines, Grand Rapids, Rochester, Saginaw, Bay City, Trenton, Cleveland, Columbus, Richmond, Detroit, Montreal, Spokane Falls, McMinnville and Toledo, and stated the following as its main conclusions:

"It is not desirable for any community to have competition in telephones unless it is to regulate some very grave evil. The almost universal experience has been that competition raises the rates materially to business and professional men."

In a veto message on the grant of a franchise to a competing telephone company in Kansas City, Mayor James M. Jones, said:

"Competition, in my opinion, is practicable and a benefit to the people only in cases where the use of the commodity furnished by one public service corporation will dispense with the use of the same commodity furnished by another. I have investigated as far as possible the results of the construction of a dual telephone system in other large cities: there is not, I believe, a large city in which the construction of a dual telephone system has reduced the price of the telephone service.

507 "In my opinion the construction of another telephone system in this city would result in tearing up our streets and pavements, and increasing the poles and wires with which the streets and thoroughfares are already burdened without any resulting good to the public or to the telephone users, to say nothing of the nuisance that would result to subscribers from the operation of two systems."

Mayor Bookwalther of Indianapolis, testified in part, as follows, before the Telephone Committee of the City Council of Cincinnati:

"An ideal system would be to have only one system, if the price were not too high. The new telephone company is at present trying to increase its rates for a business telephone from \$40 to \$50, asserting that they cannot continue operation any longer. Two years ago I advocated the admission of an independent company in Cincinnati. Since that time, conditions have changed, and my advice is to have but one system, provided the prices are reasonable."

Jacob Houssling, Mayor of Newark, N. J., writes in reply to my inquiry:

"It is my opinion that if rates are sufficiently low and the service in other respects satisfactory, it is better to have one than two telephone companies in the city. What a low rate is, is a matter for determination by each particular community. We have two telephone systems in this city. The Bell Company has reduced rates somewhat, but whether or not because of slight competition which they suffered, I am unable to state. It is my opinion that cities can best control the telephone situation by means of ducts or subways, in which the wires must be laid; that they can thus obtain a better hold, especially upon the monopolies in the telephone field than by contractual arrangements."

Justice Barnard, U. S. District Court, D. C., in an opinion delivered in a suit to restrict the rates of the Chesapeake and Potomac Telephone Co. said:

508 "In Grand Rapids, Mich., and perhaps some other cities where testimony was taken, there were rival companies, causing competition, and it was shown that nearly every subscriber had two telephones, one belonging to each company. The result in such case, is necessarily more inconvenient, confusing and expensive than to have only one company. \* \* \* It would also be a misfortune to have two or more companies doing a general telephone business here (Washington). It would not only require two or more telephones in each subscriber's office, where it was necessary for him to talk with the city generally, but the construction of conduits and lines would keep the streets torn up and inconvenience the public much more than to have the lines all in the control of one company."

Congress refused to grant incorporation to the Columbia Telephone Company to operate a competitive telephone system in the District of Columbia, on the recommendation of the U. S. Commissioners, who explained that they advised against the incorporation of additional telephone companies in the District in the belief that

"the telephone service could be better rendered by a single company under proper management and at proper rates than by two or more companies having separate lines and separate instruments. For these reasons, we recommend adverse action on the bill in question."

By a vote of 122 to 25 the Providence (R. I.) Board of Trade on April 2, 1907, successfully opposed the granting of a franchise to the Home Telephone Company of Rhode Island, and urged the City Council to refuse the applicant or any other second company permission to "undertake a telephone business in Providence, believing the best interests of the municipality are served by continuing to have a single interconnecting system."

C. B. Murray, Superintendent of the Cincinnati Chamber of Commerce, voices the feelings of that organization thus: "Only one telephone company here. More is not desirable."

Francis G. Ward, Commissioner of the Department of Public Works at Buffalo, forwards the opinion of Charles M. Morse, 509 his Deputy Engineer, who considers as disadvantages of the dual system, the necessity for business houses to have both telephones with the combined cost of the same; and, second, streets torn up for conduit construction and streets obstructed by double pole lines in those sections of the city where pole lines are not prohibited.

Mr. John E. Behan, the City Clerk of San Francisco, writes:

"Previous to the calamity of April 18, 1906, the Board of Supervisors of the City and County of San Francisco had under consideration an application of the Home Telephone Company for a telephone franchise in this City, and at that time made a thorough investigation of the merits and demerits of a dual system, obtaining advices from nearly all the prominent cities throughout the United States and Europe. With these advices before it the Public Utilities Committee of this Board, having the matter in charge, decided that it would not be to the advantage of this city to permit the operation of two systems, inasmuch as increased cost for maintenance of two telephones would result to the subscriber without any corresponding benefit.

The Board of Supervisors in office after the fire of April 18, 1906, however, granted a franchise to the Home Telephone Company, the competitor of the Pacific States Telephone, the validity of which franchise is questioned by reason of the fact of the means through which it was obtained."

W. J. Springborn, Director of Public Service of the City of Cleveland, writes:

"Our experience here has been that the having of two companies has not materially reduced the rates; in fact we find that most of the business and professional men are obliged to have both telephones, thus increasing the actual cost of service except in cases where the business is of such volume as to require two or more telephones; neither has it greatly increased the efficiency of the service. In my opinion it would be better for a municipality if but one com-

pany rendered service, which would avoid the objectionable features of a double line of poles and conduits in its streets, and if service could be had from one company at a reasonable price, it would effect a considerable saving to telephone users. The only advantage that I know of with a competing system is that possibly the service may be a little better, owing to the competition. This, however, could be provided for by the City Council making proper reservation in its grants for the regulation of service, etc."

Geo. M. Hoag, City Electrician of Cleveland, Ohio, answering a previous inquiry as to the results of a dual system of telephones, wrote:

"So far as Cleveland is concerned, the experiment of competition in the telephone business has been little less than a calamity. \* \* \* Briefly the results of telephone competition in Cleveland have been as follows: the streets are encumbered with many poles that would be unnecessary, if we had but only one company; the present users of telephones are paying probably \$175,000 or \$200,000 per year more in rentals than they would with one system; there is the inconvenience of looking through two directories instead of one to find subscribers' names; many small investors and some larger ones have made investments, which have not, up to the present time, proved desirable."

This opinion was shared by Vice-Mayor Lapp and Peter Witt, former City Clerk.

President C. B. Lockwood, of the Lockwood, Taylor Hardware Co., who is a stock-holder in the Cuyahoga Telephone Company, stated to the Cincinnati Committee that competition had increased the cost of telephone service in Cleveland, and that his firm was compelled to take both the telephones. He stated that he personally preferred the single system to the dual, and that they would never have put in the independent company if they had not been forced to do so.

One of the large telephone companies which refused information for the purposes of this inquiry, stated that

511 "Inasmuch as our operations were conducted at a loss during the last fiscal year, we prefer not to quote you the detailed figures requested in your letter under reply."

In response to further inquiry, they wrote:

"As you may know, Michigan has been a storm-center in telephone competition, and the rates of our competitors and of our own Company do not in any way represent adequate rates," and added: "A dual telephone system imposes an unnecessary and a very large double tax on the community for telephone service. It also introduces operating annoyances which do not exist where the entire community is served by one comprehensive system. Telephone competition, it seems to me, should only be resorted to where the existing system furnishes inadequate service and obtains too great a profit for its service, and then only when the existing company refuses to better its service and adjust its rates. As to the question of rates, I believe that a committee of business men, having knowledge

of the investment in the system and the amount of profit realized, can determine whether or not the rates are too high or too low."

The cashier of the Pittsburgh and Allegheny Telephone Company (Independent) in conversation with the Hamilton Committee, stated that "competition in telephones was not to be desired, that the effect of it was to increase the rates to business men, and there should be no competition unless there was very good reason for it."

The "Bulletin of the League of American Municipalities" says:

"The fact is that in every city where there are two telephone companies in operation, the business and professional men find it necessary to have the service of both companies, and where Bell rates are not reduced by the competition, these subscribers have forced upon them an additional expense for telephone service."

Finally, it is admitted by one of the staunchest independents that "when public service corporations give decent service at a reasonable price without the use of the prod of competition, competition will die for lack of sustenance."

## 512

*How Some Companies Are Promoted.*

The whole history of the independent telephone movement demonstrates that the very great majority of independent companies have been furnishing service at rates much too low to make the business continuously profitable, and at the same time provide for future growth and replacement. Indeed, it can be positively stated that every attempt to cut telephone rates to a lower figure than that justified by the experience of companies having outlived the reconstruction period has ended or must end disastrously.

Not only have the rates been too low to pay fair returns on the actual money invested, but too often the companies have been financed in a manner that from the start precluded the possibility of profitable operation. Fortunes have been made in the building of competing telephone plants, and fortunes have been lost in operating them.

In considering the organization of a new telephone company, one must never lose sight of the fact that the construction, maintenance and operation are so linked together as to be inseparable, and an honest telephone company must be all these three things in one. The construction of a telephone plant is never complete. Every new subscriber entails fresh construction. The plant must be maintained and cared for out of the money received for services rendered by the operating department. The three departments are interwoven and interdependent and must stand or fall together.

But one of the reasons which have brought about so many failures of independent telephone companies is that promoters have found that the best way to get quick returns, is to make a profit on the construction of the plant, and they certainly deserve great credit for the clever manner in which they secure their end.

## 513

An application is made to the City Council for a franchise which the investing public generally regards as something of great value but which after all is merely the permission



to do business. The rates proposed to be charged, always lower than the prevailing charges, are limited in the franchise and the promoters claim that under them they will be able to make liberal profits.

Canvassers are then sent out after subscribers to the new system—which is not yet built—and advantage is taken of the agitation to get people to sign iron-clad five-year contracts. Then the construction company is formed. It is directly or indirectly controlled by the promoters, and bonds far in excess of the cost of construction are issued, together with an equal amount of stock. These securities of the telephone company are turned over to the construction company and the plant is erected.

Sometimes the plant is good; sometimes bad. To the public it always looks good because it is new. Operators are keyed up to "top notch" and not infrequently the new concern gives extraordinarily fine service from the start. The public is called upon to witness that the promoters have made good and kept all their promises.

Up to this nothing has been done to interest "local" capital. The stock and bonds of the company, turned over to the construction company in consideration for the plant—the exact cost of which will never be known to the public—are now unloaded by the construction company people, who give out that they are only in the construction business and are seeking but a ten per cent profit. The bonds are offered at par, or less, with stock thrown in as a bonus. Civic pride and a public spirited desire to support home industries do the rest.

514 Local bankers, merchants and financiers generally fall over each other to buy the bonds, especially if the promoters have waited till the first operating year is completed and have published a statement of earnings and expenses showing that the interest on the bonds has been met and that profit is available for distribution as a dividend.

But as soon as the construction company has unloaded its securities and taken its profits, the service begins to fall off and the profits begin to dwindle. If the number of subscribers increases at all rapidly, rates have to be raised, but it is rarely that more than the operating expenses can be met. By the fifth year the reconstruction period has arrived and the holders of the securities realize that the so-called profits of preceding years were not profits at all, but should have been spent on maintenance or put aside for reconstruction. Besides, no depreciation fund has been formed, and one of three things is bound to happen. The property goes to the bond holders, or preferred stock is issued, or a receiver is appointed. Within ten years every cent invested by local capitalists has been lost, and the plant has either been lost also, or enough new capital has been invested to double the original cost.

#### *Publicity and Co-operation.*

Throughout this inquiry, I have had the willing co-operation of the Cumberland Telephone Company. As my work has pro-



gressed, I have been more and more impressed with the great advantage that would accrue both to the Company and to the public, by an enlightened policy of publicity. By no other means, can misunderstanding be avoided, and the co-operation of the public secured. No fair-minded man will deny that the Telephone Company is entitled to a just return on its investment. By the  
 515 quarterly publication of detailed statements of its earnings and expenses, the Company would be able to show its patrons just how much money it is making, and so long as the operating outlays are not excessive and the net return is within the reasonable margin of 10% profit, the justice of its charges will be generally conceded. There will be no more talk of extortion.

Similarly, the service would be very greatly improved and the extension of the telephone increased, if an intelligent effort were made to educate the public up to the proper use of the telephone. Would it not be, after all, an easy matter to explain to the public what a "peak-load" is, and to invoke their co-operation in keeping the load on the lines as low as possible at that critical period of the operating day.

The patrons play a very important part indeed, in the operating of a telephone system; they can almost make, and certainly can mar, the efficiency of the service. The Company, above all things, needs their good-will, and by giving all possible publicity to its affairs, will remove prejudice and misconception so fatal to its interests.

I believe the public has an absolute right to the knowledge necessary to enable it to judge understandingly whether a public service corporation is acquitting itself of its duties honestly and well, and I feel certain that honest corporations have everything to gain and nothing to lose by taking their patrons fully into their confidence, and submitting their acts and doings to the judgment of enlightened public opinion.

#### *Recommendations.*

My recommendations for the improvement of the service and the re-adjustment of rates, are as follows:

- 1st. Abolition of all Party Line business and professional telephones.
- 516 2nd. Abolition of all four and six Party Line residence telephones.
- 3rd. Abolition of all Extension Sets on Party Lines.
- 4th. The endorsement of the existing schedule of rates, (less those for the services to be abolished); with the understanding that "measured" and "equitable" service rates are to be the same price for all classes of subscribers.
- 5th. The installation of meters on all "measured" and "equitable" service lines.
- 6th. Quarterly publication of statements of the Cumberland Telephone & Telegraph Company's earnings and expenses in New Orleans.
- 7th. Petition by the Board of Trade to the City Council to pass a

resolution calling upon the State Railroad Commission to give legal sanction to the Board of Trade's recommendations.

In conclusion, I wish to state that my investigation has forced upon me the conviction that better service, fairer rates, and more permanent benefits to the public can be obtained by co-operation and mutual confidence, between a telephone company and its patrons, than by regulation, however drastic, or competition, however keen.

It is my earnest hope that the result of this report will be to re-establish that sympathy and restore that confidence which ought to exist between a public service corporation and the People. If that result is achieved, I shall feel that the time and labor given to this inquiry have not been spent in vain.

I have the honor to subscribe myself, Gentlemen,

Your most obedient servant,

HENRY NOBLE HALL.

517 In the Circuit Court of the United States for the Western  
Division of the Western District of Tennessee.

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS et al.

*Notice of Taking of Deposition of James E. Caldwell.*

Filed June 4, 1908. Dan F. Elliotte, Clerk.

MEMPHIS, TENNESSEE, June 4th, 1908.

To Messrs. Thomas H. Jackson, City Attorney, and Marion C. Evans,  
Ass. City Attorney of the City of Memphis:

I desire to notify you that on Saturday, June 6th, the deposition of James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a witness for the complainant, will be taken in the City of Nashville, at the office of the Cumberland Telephone & Telegraph Company, beginning at 10 o'clock A. M. and continued until completed.

This notice is given you under the following clause set forth in our stipulation of agreement in this case of June 2nd, 1908, to-wit:

"It is further stipulated and agreed that at any time before the hearing, evidence may be introduced by either party concerning the conditions surrounding any of the rates above set forth in this stipulation; and also evidence concerning any other rates in any other cities."

WRIGHT & WRIGHT,  
*Attorneys for Complainant.*

The service of the above notice is accepted this 4th day of June, 1908.

MARION G. EVANS,  
*For Defendants.*

518

JJ.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY  
VS.  
THE CITY OF MEMPHIS.

*Deposition of James E. Caldwell, Compl't's Witness.*

Filed June 10th, 1908. Dan F. Elliotte, Clerk.

The Deposition of James E. Caldwell, Taken in Pursuance to the  
Attached Notice on Saturday, June 6th, 1908, at the Office of  
the Plaintiff, in the City of Nashville.

It is agreed, that subject to exceptions for competency and relevancy, all formalities in the taking of this deposition are expressly waived, and that when the same is written out and signed by the witness, it may be delivered to counsel for plaintiff, who will take the same to Louisville, as the case is to be heard at that point, and sufficient time does not intervene within which to send it to Memphis to be filed and then transmit it to Louisville, where the case is to be heard.

Present: Mr. W. L. Grandbery, Attorney for Complainant.  
Mr. M. G. Evans, Attorney for defendant.  
Buford Duke Notary Public and Stenographer.

519 Said witness JAMES E. CALDWELL, Produced and first duly  
sworn, deposed and testified as follows:

Direct examination.

By Mr. GRANDBERY, for plaintiff:

Q. You are the president of the plaintiff company, and have heretofore testified in this case?

A. I am, and have testified.

Q. Certain matter has been brought into the case with reference to contracts between the plaintiff company and the City of Evansville and the City of Nashville; I will ask you to state whether or not the contract with the City of Nashville is in force and being observed with the plaintiff company?

A. That contract is no longer in force and has been cancelled by mutual agreement, both parties to it being willing to the abrogation of the contract, and it has not been in force since December 1907.

Q. A contract with the City of Evansville is exhibited, showing certain rates in that city. Were those rates any lower than the rates that had been charged by the plaintiff company before that contract was made, when there was no agreement as to rates?

A. No sir. There was no change in that, the same rates in the main were provided in that that had existed for years before, when there was no contract on rates. In other words, the rates in that contract are such as we had made voluntarily before.

Q. Is Evansville and Chattanooga in the same class of cities, with respect to telephone conditions and rates?

A. Well, in some respects they are.

Q. Have you any agreement with respect to rates in Chattanooga?

A. No sir, there is no rate contract there, there is none  
520 with the city, with reference to the city.

Q. How do the rates in Chattanooga and Evansville compare?

A. The rate- in Evansville, for business purposes, are a little higher than they are in Chattanooga. There is a difference in the schedule for distances.

Q. It is stated in the stipulation that the Legislative Council of the City of Memphis, before the rate ordinance in controversy was introduced before the Council for passage, appointed a committee to investigate rates, and that the company was heard. State when there was any discussion between any of the company's officials and the City of Memphis officials, with respect to telephone matters in Memphis?

A. My recollection of that is that in 1906, perhaps in the summer of 1906, there was a controversy on with the city, but that controversy related to the matter of our right to do business there, and as I remember, our General Counsel was there looking after that, as it was a legal question largely; and it may be the rate question was brought into it; but that was not the leading issue. Sometime subsequent to that matter, they did bring up the question of rates, but we were not invited or given an opportunity, or did not at any rate, participate in the matter. The City simply took it in its own hands and settled the question without us being heard or given an opportunity to be heard.

Q. A report of Henry Noble Hall, a Special Commissioner appointed by the New Orleans Board of Trade, is attached as Exhibit D to the stipulation. Are you familiar with that report?

A. Yes, I have read that report.

521 Q. I will ask you to state whether or not the facts therein contained, are true, and whether you know them to be true?

A. Yes, I think all the facts stated in the report are literally true.

Q. The stipulation refers to rates of the Bell Telephone Companies in the Cities of Philadelphia, Pittsburg, Cleveland, Grand Rapids, Indianapolis and Syracuse, N. Y. I will ask you to state whether or not you have knowledge or information with respect to the rates of the Bell Companies in those various cities?

A. Yes, I have a general knowledge of them, and such knowledge, I think is correct.

Q. Taking first Philadelphia, the stipulation states that the business rate in Philadelphia is \$60. Is that correct?

A. No sir. They may have some limited rate or limited service at such price, but that is not the rate that would be compared at all with the rates and manner of rating which we have in Memphis, which is in the main, for unlimited service. The rates for a limited service, in Philadelphia, would be far in excess of sixty dollars a year.

Q. I hand you a pamphlet called "Telephone Service and Rates", being a report of the Committee on Gas, Oil, and Electric light, to the City Council of Chicago, dated September 3rd, 1907. I will ask you to state whether or not you are familiar with that pamphlet and have had occasion to examine it?

A. Yes, I am very familiar with it, and have examined it.

Q. I will ask you to attached it as Exhibit No. 1 to your deposition?

A. I herewith attach it and mark it Exhibit No. 1. to this my deposition.

Exhibit No. 1.

522 Q. In that pamphlet, rates for various cities are set out I will ask you to state whether or not you have knowledge of those rates and whether or not they are correct?

A. Yes sir. Those rates were correct then and are still correct; There may have been some slight modifications in some of them since that time, but not material, and such changes as have taken place are more apt to be advances than decreases.

Q. Attached to the stipulation is a pamphlet Marked C and purports to be a dissertation upon the advantages and low rates of the independent telephone companies throughout the country, which was published in March 1905. I will ask you to state whether or not many of the companies therein stated to be in prosperous condition on low rates, are now in existence?

A. The paper you refer to appears to have been gotten out very largely in the interest of and to promote the so-called independent telephone development, with a view of inducing cities to grant franchises therefor and especially, for the same of the securities of such undertakings, the main argument being to show that the telephone business could be conducted on much lower rates than were being charged by the older companies. A great many of the companies mentioned and referred to in that pamphlet, some of them are no longer in existence. Most every one of mentioned therein, has since that time been making an effort to advance their rates, notably instances, up in Indianapolis, Ind., Columbus, Ohio and Louisville, Ky. Indeed, there is hardly any so-called independent telephone company in the country that is not trying or talking about trying, to advance its rates. They all feel the great necessity and importance of doing so for they realize at the rates they were experimenting with, that they are in a failing condition. So long as they could

523 sell new securities and get new money with which to pay dividends on the old securities and the interest on their bonds,

their schemes worked very well; but when financial conditions got so that new securities could not longer be sold and the business itself had to be depended upon to furnish revenues to pay dividends and interest on bonds, then it was revealed that the business would not do so, and therefore, there was no alternative but to advance the rates and get more revenues, if the business was to continue.

Q. I observe in this Exhibit B the rate for Atlanta is put down at \$42.00 for business and \$30. for residence, telephone. I presume this refers to the so-called independent company?

A. Yes, it has had a checkered career, has been re-organized, certainly once, if not oftener, it is operating in a very restricted area and in fact, is carrying but a very small part of the telephone load of the city, and has a very limited development.

Q. How does the company which really does the telephone business in Atlanta, compare with respect to rates, with the plaintiff's rates in Memphis?

A. They are, on the whole, higher. Their rates, as I say, are on the whole, higher. Their business rate is about the same; their residence rates are higher.

Q. Chicago, Illinois, is put down in Exhibit C, is put down as having a rate of eighty-five dollars for business, and has ten thousand business telephones. Do you know anything about that company?

A. Yes, that is a so-called automatic company that was started, apparently to demonstrate the effectiveness of an automatic system.

For a great many years they placed telephones around where-  
524 ever they could, on trial. As I say, very largely, it seems, for the purpose of demonstrating or showing the value or advantages of a so-called automatic switchboard, and I understand, at the same time, to give the promoters or owners of that system an opportunity to see for themselves how it would work. It has attracted little or no attention, and certainly cuts no figure in the business in Chicago.

Q. What about Columbus, Ohio, on rates of \$40, for business and \$24. for residences?

A. The company making that rates was very active in its business for some time. Within the last few years its main activity has been, however, to advance those rates, and they have been in more or less of a heated controversy with the community on the subject. Just what the upshot of it is, I do not know, but their main effort or their earnest effort for the last year, as I say, has been to raise their rates.

Q. What about Indianapolis, Ind.?

A. It is in the same identical condition. That company has been leased and merged and financed around and around, until I don't know what is the present representative of the movement; they have been going through so many financial evolutions, but the last effort was to raise their rates and get money enough to live on, as they stated boldly and without hesitation, that unless they could raise their rates, they would have to go out of existence, that they would fail.

Q. What about Louisville, Ky., on rates of \$48. for business and \$30. for residences?

525 A. That company has been making an effort to raise that rate for a year. They are now in a controversy and litigation on the subject. The council has passed a franchise allowing them to advance their rates up to a point equal to the rates we are charging at Memphis, and somewhat higher, in fact. The legality of the franchise is being questioned, but, so far as the company is concerned, it is insisting upon it and claiming that the advanced rates are necessary to their existence. As I say, that controversy is going on right at this moment.

Q. What about Memphis, Tenn., on rates of \$48. and \$30.?

A. The telephone company making that rate in Memphis, has a very limited development. It has made no effort, for years, I say it has made no effort—it has not at any rate, made an extension or growth to speak of, in its business, and has stated again and again, that it was unable to meet any growth that its financial condition was such that it could not do so. They have made no secret of their crippled condition and as a telephone company, it hardly has a right to be considered as such?

Q. What about Rochester, N. Y.?

A. The so-called independent concerns at Rochester, that are making the rates named there, has been put through receivers and bankrupt proceedings. Its bonds selling down to something like ten or twenty cents in the dollar, and the stock wiped out altogether, and what will be its future course, is altogether uncertain, as a financial proposition, it was a complete failure.

Q. What was the capitalization of that concern?

526 A. It was a part of an aggregation that had a capitalization going into the millions, something like fifty millions capitalization, and the whole thing was a dismal failure, the stockholders being wiped out altogether and the bonds being scaled down to some ten or twenty cents in the dollar.

Q. Is the Savannah Company, on rates of \$40.00 and \$25.00 in existence now?

A. No sir, that has gone out of existence altogether in the last six month-?

Q. What about Trenton, N. J. on rates of \$36.00 and \$24.?

A. If it is still in existence, I do not know it. I am not sure that it is or is not.

Q. Mr. Caldwell, taking the list of cities where telephone rates are given in Exhibit C, purporting to be independent telephone companies, is there a single one of them that shows any financial life, or any strength, on the rates they are charging?

A. There is not a single one, and there is not a single telephone company that can do business on that basis of rating, it is an utter impossibility and every concern that has tried it, no matter where located, or under what dispensation, has found that it could not be done.

Q. The Maryland Company that is spoken of so highly in the Sears Pamphlet, what has become of that?



A. It has gone into new hands on a new basis, supposed to be a re-organization scheme. Just what its condition is, I am not advised, but it is considered as a failure.

Q. Is it possible to compare telephone rates between different cities, without any other data or information any more than it is to compare the prices of any article of merchandise?

527 A. It is just as impossible to compare the telephone rates of different localities as it is other commodities. Local conditions have such an influence and bearing on it, that they can only be referred to as matters of side light.

Q. Can you give any reason why intelligent people in Memphis, for instance, will voluntarily pay the plaintiff company seven dollars for a business telephone, when the Memphis Telephone Co. is offering a business telephone at four dollars a month?

A. It is for the very good and sufficient reason that the service they get for, seven dollars is so much more superior in every way than that which they get for four dollars.

Objected to by counsel for defendant, to foregoing question and answer, on the ground that it is purely argumentative.

Q. In the Sears pamphlet, it is stated that the reason the Bell rates are high, is that high rates are needed to pay dividends, and in the absence of competition, can be charged; and that the Bell companies, not only have charged high rates but have introduced blind systems of extortion such as measured service, party-lines and extra charges for various accessories, to the ordinary service, and that the main reasons why the Bell rates can not be equitable to the public are these: high depreciation; high capitalization, high cost of equipment, high cost of maintenance, royalties to parent company, and lack of interest on the part of employes. Are you familiar with the capitalization of the Bell companies throughout America.

A. I am in the main. I am familiar with the telephone business generally, as I have made it a study for a great many years. I feel that I have as much knowledge on that subject as men in the business possess.

528 Q. I hand you what purports to be the annual report of the Directors of the American Telephone and Telegraph Co. to the stockholders, for the year ending December 31st, 1907. and ask you to attach it as Exhibit No. 2 to your deposition.

A. I have the document you refer to and so attach it as directed.

Exhibit 2.

Q. Have you read that, and are you familiar with the facts therein stated?

A. I have read it and am familiar with the facts therein stated.

Q. Are those facts correct?

A. They are, and are fairly stated.

Q. What have you to say with respect to the reasons why the Bell rates can not be equitable. For instance, high depreciation, high capitalization, high cost of equipment, high cost of maintenance, royalties to parent company and lack of interest on the part of em-

ployés, speaking with reference to the Bell Company of which you are president?

A. Absolutely none of those are true with regard to this company; but, on the contrary the very reverse of that is true. The company is capitalized on the lowest possible basis? Its maintenance is most conservatively considered, and not any more than it should be, its equipment is kept abreast of the times, and with the development of the art; its employés are rather enthusiastic in the company's business, because great numbers of them are stockholders in it and hence have every incentive to be interested and loyal in its affairs.

529 Q. Mr. Caldwell, is it possible for the plaintiff company by any kind of economies, to operate its plant in the City of Memphis upon the rates prescribed in the ordinance in controversy?

A. It would be absolutely impossible. There is no way imaginable by which it could do so and perform any part of its duty and obligation to its customers. In fact, the rates named, have a just right to be termed ridiculous.

Q. I will ask you to state whether or not the rates in Memphis, charged by the plaintiff company, are in excess or below the rates charged in like exchanges throughout the United States?

A. The rates charged by this company in Memphis are on a parity with the rates charged by other companies throughout the United States in cities of like size, where there is any hope or prospect of making a living condition or avoiding bankruptcy. In other words, any company that hopes, or is trying, to keep itself solvent and in condition to perform its duties to its customers, are making rates that are fully up to and on a parity with the rates charged by this Company in Memphis.

Q. Have the people of Memphis any concern or interest in the success of the plaintiff's telephone plant in that city?

A. They necessarily have, if they have any desire to have telephone service, and they undoubtedly have, as it is the only company that has shown any ability to meet their growth and requirements, and develop the trade area of the city for the telephone system has come to be considered a very important and potent agency in the conduct of the commercial affairs of a city, and this company's system carries well nigh the telephone load of the city.

530 Q. If the company's condition is rendered such on low rates, as to prohibit it from continuing to improve and extend that plant in Memphis, and that trade area of Memphis what happens to it?

A. It would naturally go into deterioration and its usefulness becomes more and more impaired.

Q. Would this have any effect on the business interests of Memphis?

A. It undoubtedly would, for the reason that the facilities would carry the trade to other rivals, where there was a profit in conducting the business, for people in the surrounding country could be put in communication with the cities of St. Louis, Nashville, Chicago and other places, where they could transact their business just as effectively as they now do in Memphis.

Q. Take the two cities on either side of Memphis St. Louis and New Orleans, those being the two cities located on the river, what are the business rates in St. Louis and New Orleans, as compared with Memphis?

A. They are quite fifty per cent higher in each instance.

Cross-examination.

By Mr. EVANS for defendant:

Q. Mr. Caldwell, can you stated, without going to your books, how many business telephones and how many residence telephones are operated in Memphis by the Cumberland Telephone & Telegraph Company?

A. The whole of this is shown in a classified statement filed as an exhibit to the affidavit of H. Blair Smith in this case.

531 Q. Do you remember what the rates were in Memphis, in the year 1890, for business and residence telephones?

A. They were about five dollars for business and four dollars for residence, I think that was exactly the rate. The residence rates was higher then than now, and the business rate was lower, but those rates were for what was known as a ground line service. That is to say, it took only one wire to serve a customer and a very much simpler form of switchboard and interior apparatus than is now required or employed and there is now being required and used, two wires to each subscriber's set, instead of one as at that time. At that time there was no scaling rate, that is to say, there was no cheaper forms of service as we now put out for limited service, but everything was confined to those two rates. Every residence was four dollars and every business house was five dollars then, making an average rate that was paid in Memphis at that time, higher and considerably higher, that it is now.

Q. When was the next change in rates in Memphis made, and what were they?

A. Soon thereafter, a few years thereafter, there were modifications and changes in rates, experimenting, you may say, with various schedules and classifications or rates, which has been going on at intervals, down to the present time, the great effort being to put the telephone in reach of all kinds and conditions of people, to serve, if you please, society at large, both within the corporate limits of the city, and the suburbs, and the entire surrounding country. In other words, to develop the commercial area or the trade district of the City of Memphis, and in doing so, as I say, various experiments in rates were tried from time to time, some of which were found

532 satisfactory some were found to be entirely unsatisfactory, unsatisfactory both to the users and to the company.

Q. I note from an exhibit filed in this case, in which the rates for the various years in Memphis are stated, that it was in 1903 that the \$5.00 rate for Blake transmitters, was discontinued? Is that correct?

A. Substantially so, I presume; I would say so.

Q. And since that date the business rate has been exclusively seven dollars net, is that correct?

A. No sir, that is not correct. That was so for one style of service,

but there were other business rates that were in force during that time for the limited service and party lines and private lines; there were no new orders taken for Blake sets, for the reason that that style of service was obsolete and out of date and being no longer manufactured.

Q. I will change the form of my question and put it this way: That since the year 1903, the rate for unlimited service, direct private line, in Memphis, has been seven dollars net, is that correct?

A. Since that time that has been the rate for unlimited, long distance, metallic service but that rate was asked for, that class of service, for a great many years prior to that time; Indeed, when that class of service was first introduced, the rate asked therefor, was higher. It was then voluntarily reduced to the seven dollars net. The circumstances at that time were, that there was no new business taken for the so-called Blake equipment, for the reason, as I have stated before, that was an obsolete service and it was no longer manufactured and was unsatisfactory.

533 Q. You mean that, for the Blake transmitter, during the time it was in service, the five dollar rate was charged and that the seven dollar rate was charged for the long distance service? Is that correct?

A. Yes, those are net rates, that is where the parties paid quarterly in advance, taking advantage of the discount.

Q. I note from the same exhibit, which I believe is exhibited to the deposition of Mr. H. Blair Smith, that in the year 1906, or 1907, the rate for residence telephones in the City of Memphis, was changed from \$2.50 to \$3.00; is that correct?

A. Yes, that is correct. The \$2.00 rate was found to be unremunerative.

Q. Now, about the time of the changes that I have been speaking of, that is to say, when the business rate for direct private lines, unlimited service was fixed at seven dollars, and the Blake transmitters discontinued, and when the residence rate was changed from \$2.00 to \$3.00 it was at this time, I say, that the dissatisfaction among the citizens of Memphis arose, which terminated in the passage of this ordinance, was it not?

A. I don't know whether that is true or not; it may be so. It is quite in the nature of things, that anything that looks towards raising a rate of raising prices, can not be made popular, and will be resented by a certain number of people, whether it is right or advisable or necessary or not. Therefore, it is highly probable, as I say, that this circumstance may have produced the agitation that you refer to, but the rates we were making have been demonstrated by time to be absolutely justified and necessary, and the  
534 movement on the part of our competitors, all over the country gives abundant proof of that fact.

Q. Please state how many subscribers for business telephones in the City of Memphis are paying at the present time the \$7.00 rate?

A. As of September 22nd, 1907, out of the 3971 business telephones, there were 880 of them paying this \$7.00 per month rate.

Q. What rates are the remainder of business telephone subscribers paying?

A. They are paying rates ranging from sixteen and two third cents a month, up to thirteen dollars and a half.

Q. What number of residence subscribers are paying the three dollar rate, and what number are paying the two dollar and a half rate?

A. At that date, the number paying the three dollar rate was 483, and the number paying the \$2.50 rate, was 2462.

Q. Mr. Caldwell, what character of service is that for which the subscribers are paying sixteen cents to thirteen dollars, as business rates?

A. It covers every phase and completion of the business necessities of the city, and represents a variety of necessities and desires which an active commercial community presents. There is one at thirteen dollars and a half, and is undoubtedly a customer located some distance from the center of the city. The 16 $\frac{2}{3}$  cents, represents a user of someone else's telephone that *it* willing for him to do so, by having his name especially listed in the directory. That covers about the extreme ranges.

Q. In your direct examination you stated that the Nashville contract which is filed as one of the exhibits to stipulation of counsel, had been discontinued by consent of both parties; Have you  
535 any contract in existence now with the City of Nashville, with reference to rates?

A. No sir. We have no contract with the City of Nashville with reference to rates, at all.

Q. Have you any with the City of Chattanooga?

A. No sir.

Q. Have you any with the City of Memphis?

A. No sir.

Q. In the City of Evansville, have you examined the contract which is also an exhibit to the stipulation of counsel, and is that correct?

A. It is correct, yes sir.

Q. In the City of Nashville, do you pay any part of the gross receipts of the company to the City?

A. No sir, we do not.

Q. What are the business and residence rates in the City of Nashville at present?

A. Substantially identical with what they are in Memphis, now. We are charging in Nashville the same rates that we are charging in Memphis.

Q. Mr. Caldwell, with reference to the statement in the stipulation of counsel and agreed to and signed as a correct statement by your local counsel, *was* well as counsel for the City of Memphis, to the effect that before the passage of the ordinance in controversy, a committee was appointed by the Legislative Council of the City of Memphis on Telephone Rates and that said rates were investigated, as set out in the aforesaid stipulation, you did not mean to dispute

in your direct examination, the accuracy of that stipulation, did you?

536 A. I had no knowledge of the stipulation, and therefore had no idea of disputing it. What I intended to say and did say, was that in the investigation they made, they made no investigation of our condition or affairs, with reference to rates.

Q. In your direct examination, you have testified regarding certain independent telephone companies in the cities of Atlanta, Chicago, Columbus, Ohio, Louisville, Ky. Indianapolis, Memphis, Tenn., Rochester, N. Y., and Trenton, N. J. I will ask you how you secured the information which you have given?

A. In various ways that men do with regard to matters affecting their business. What appeared in the public prints, private correspondence and in interviews with people who are familiar with and in the active conduct of affairs; official court notices and reports and in various ways and in so many ways, one circumstance proving up another, that it leaves me no room to doubt the correctness of my information. In other words, I have endeavored in every way to satisfy myself of the truth of the matter; and feel I am in position to know that the information which I hold is thoroughly accurate and reliable.

Q. You were speaking then, from information which you received from publications and from third parties, and not your own personal knowledge. Is that correct?

A. I was speaking with reference to my personal knowledge gathered in as reliable and proper a manner as important facts usually are gathered by those seeking the truth. It was not from mere haphazard publication or information, but as I say, it was gathered in various ways and in every way that would satisfy me that I was getting the truth and the full truth, in connection with the cases.

537 Q. Have you any authentic reports or compilations setting forth the facts or conditions which you have testified to that you can now produce?

A. I assert it as a fact, that I am familiar with what I am talking about, and I have not a waver in my mind about it. In other words I am as thoroughly satisfied of the truth of what I am saying as I am with reference to any other fact that I might give testimony concerning. In other words, there is not a lingering doubt with regard to the truth of the statements that I am making.

Q. Referring to Exhibit No. 1 to this, your last deposition Mr. Caldwell, I find on page 179 thereof, the following rates for the Maryland Telephone & Telegraph Company; Business, direct line, unlimited service, \$72. per year; total number of telephones, about eleven thousand. Population of Baltimore, 539,000. Is that correct?

A. I think it is.

Q. Is that company a Bell or an Independent Company?

A. Well, it has been operated as an independent company.

Q. On page 180 of the same exhibit, I find the City of Cleveland Ohio, with a population of 426,000 the rates for the Cleveland Telephone Co. are: Business, direct line, unlimited service, \$84.00 per



year; residence \$48.00 per year. Total number of telephones 28,404. Are those rates correct, and is that a Bell or an Independent Co.?

A. I think those are the rates of that company and I know that its affairs are not satisfactory, for there has recently been a change in its management, with the hope of bettering its condition. I think it is a Bell Company.

538 Q. In the same City, I find the rate for the Cuyahaga Telephone Company, direct line, unlimited service telephone, seventy two dollars; residence, forty eight dollars, Total number of Telephones, 24,030. Is that correct, and is that a Bell Company or an Independent Company?

A. It is an Independent Company and I think the figures there are correct, and I know, as an actual fact, that both companies in that city have been very much dissatisfied with their financial conditions.

Q. On page 182 of the same Exhibit, for Buffalo, N. Y. a population of 372,000, find the following residence rates, unlimited service direct line \$48.00 per year, with total number of telephones, 22,500; that is a Bell Telephone Co., in that district?

A. Yes, that is a Bell Telephone Company, and that rate is correct; but coupled with the fact that all business telephones pay a measured rate; in other words, there is no unlimited service for business houses at all; they pay for every message that they send.

Q. For the Pioneer Telephone Company, quoted on page 183, find the following rates: Direct line, business, unlimited service, \$48.00 per year; residence \$36.00 per year; total number of telephones 14,000; is that correct, and is that a Bell or an Independent telephone?

A. Independent company. I haven't a doubt of the correctness of the rates; but those concerns that have been experimenting, and they have been experiments, all over the country, have tried every sort of rate—in fact, the rate seemed to be a matter of no concern with them, it is a matter of selling securities, and they have succeeded in selling securities better in proportion to the number of subscribers, for the public were fooled with the notion that  
539 a big subscription list necessarily implied a great profit, therefore these schemers could work their schemes better by making a very low rate and swelling the subscription list abnormally and extraordinarily, and therefore fooling the purchasers of their securities much easier, and this was really the business they were engaged in.

Q. On page 184, for the city of Pittsburgh, Pa., population of 352,000, find the following rates for the Pittsburgh & Allegheny Telephone Company: Business rates, unlimited service, direct line \$72.00; residence, \$58.00; is that correct?

A. I haven't a doubt of it.

Q. That is in a restricted district?

A. I think the rates that you are reading from the exhibit are correct, and that in the main they explain themselves, when the full facts surrounding them are made known.

Q. On page 186, for the City of Detroit, with 220,000 inhabitants, find the following rates for the Michigan Telephone Company;



business, unlimited service, direct line, \$80.00 per year; residence, \$46.66 per year, with the total number of telephones 23,000; state whether or not that company is a Bell Company, and whether those rates are correct or not?

A. That is a Bell Company, and the rate stated there is correct; but it must be stated, in that connection, that at Detroit both the Bell company and the opposition proved a complete failure, and were sold out, and the properties of the Bell company were bought in by the bond holders for their bonds, the floating indebtedness and the stockholders were wiped out entirely, and the opposition has gone out of existence altogether.

540 Q. State when all this transpired that you have just spoken of?

A. Within the last three years.

Q. This exhibit No. 1, from which I am reading, purports to be a correct compilation of rates on September 3rd, 1907; state whether or not the rates which I have just read as being correct on that date have been changed since this publication?

A. Not to my knowledge; I think not, not materially.

Q. On the date of this publication, on page 186 thereof, Home Telephone Company, in Detroit, Michigan, has rates quoted as follows: business direct line, unlimited service \$30.00 per year, residence \$40.00; state whether or not that is correct?

A. I have not a doubt of the correctness of it.

Q. For the city of Washington, D. C. with a population of 298,000 on page 188, I find rates for the Chesapeake & Potomac Telephone Company to be a measured service rate for business telephones, and for residence telephones, unlimited service, direct private lines, \$48.00 per year, with the total number of telephones 26,000; state whether or not that is correct?

A. Yes, I think that is correct.

Q. In the city of Louisville, Kentucky with a population of 220,000 people, find the Cumberland Telephone & Telegraph Company's rates, quoted on page 190, to be as follows: Business, direct line \$96.00, residences, direct line, \$36.00; number of telephones, 13,500; and for the Home Telephone company, the same City, business rate, direct line unlimited service, \$48.00 per year; residences, within one mile of courthouse, \$24.00 per year, number of telephones 11,250; state whether or not those rates quoted are correct?

541 A. The Cumberland's figures are correct, except with regard to the residence rate, which has been advanced to a net rate of \$42.00 per year; and the rates of the Home Telephone Company are now being advanced to \$84.00 for business, and \$36.00 or \$42.00 for residences. As I said in the previous part of my deposition, the rates of the Cumberland were the rates that were the result of the investigation and special report by a committee from the Board of Trade of the City of Louisville, who approved their fairness and justness. The rates, as I say, of the Home Company, the City Council of the City of Louisville has just passed an ordinance, at their earnest solicitation and request, allowing them to advance

their rates to \$84.00 per year for business, and \$36.00 or \$42.00 for residences.

Q. In the city of Indianapolis, Indiana, with a population of 205,000, on page 191 of the said exhibit, find the rates of the Central Union Telephone Company quoted as follows: business, direct line, unlimited service, \$54.00 per year; residence \$24.00 per year; total number of telephones, 9800; state whether or not that is a Bell telephone company, and whether it is correct.

A. That is a Bell Telephone company, and I think the rates are exactly correct; and it must be further stated that the Central Union Telephone Company has been in a precarious condition for some time, and has not paid a dividend for many years, and has had to resort to its stockholders to save it from extinction.

Q. In the same city, and on the following page, find the following rates quoted for the Indianapolis Telephone Company; business, direct line, unlimited service, within two miles, rates \$40.00 542 per year; residence, \$24.00 per year total number of telephones in the Indianapolis district, 11,500; state whether of not that is correct?

A. I think it is entire- correct; and it must be stated in that connection, that that company has proven a complete financial failure; has been reorganized once, at any rate, and is now engaged in the same business, and is making a desperate effort to have its contract with the City changed so that it can advance its rates materially.

Q. The City of Kansas City, Missouri, page 194; the rates are quoted; business, direct line, unlimited service, \$54.00 per year; residence, \$36.00 per year, total number of telephones, 16,800 state whether or not that is correct?

A. I think it is correct, except that they are trying to get conditions around where they can advance those rates both companies, that is an independent company.

Q. Mr. Caldwell, what are your rates in Evansville, Indiana?

A. \$5.00 for business, and \$2.50 for residences.

Q. And what are your rates in the City of Chattanooga, Tennessee?

A. They are \$4.00 or \$4.50 and \$2.00 within a restricted area, and then the rates advance very rapidly as the area extends.

Further this deponent saith not.

JAMES E. CALDWELL.

Signed and subscribed to before me this June 9th, 1908.

[N. P. SEAL.]

BUFORD DUKE,  
Notary Public.

543 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH CO.

VS.

THE CITY OF MEMPHIS et al.

EXHIBIT NO. 1 TO THE DEPOSITION OF JAMES E. CALDWELL.

Filed June 10th, 1908. Dan F. Elliotte, Clerk.

\* \* \* \* \*

544 & 545 *Report of the Committee on Gas, Oil and Electric Light to the City Council of Chicago, September 3, 1907.*

To His Honor the Mayor and the Members of the City Council:

Your Committee on Gas, Oil and Electric Light, to whom was referred several ordinances and communications pertaining to the subject of telephone service and rates, in the City of Chicago, has considered the same and respectfully submits herewith its report:

\* \* \* \* \*

546 From January 24, 1906, until July 26, 1907, a period of eighteen months, the Committee was engaged in a constant consideration of the telephone subject. An official stenographer was engaged and the proceedings of all meetings were reported. Approximately 5,500 typewritten pages of statements of experts and engineers and arguments of counsel, representing the various interests, have been taken before the Committee. More than one hundred sessions of the Committee have been held in the consideration of the subject. All available information and data have been secured. Every opportunity for hearing and for thorough discussion has been given. It is difficult to see how a great subject of this character could receive a more fair, careful, impartial and complete inquiry. The investigation was assisted by the advice of the most competent experts that could be secured, and as its legal representative, the Committee at all times has had the counsel of Mr. Maclay Hoyne.

547 The Committee completed its consideration of the subject on July 26, 1907, by its favorable action upon the ordinance of the Chicago Telephone Company.

\* \* \* \* \*

548 Appointment of Special Telephone Commission.

After laboring for several months in consideration of the telephone question, listening to the statements of engineers representing the various telephone interests and to arguments of their counsel, being convinced more and more of the intricacies and technicalities of the subject, the Committee decided at its meeting held on Decem-

ber 4, 1906, to secure the assistance of expert telephone engineers. Mayor Edward F. Dunne, in a communication sent to the Council on September 24, 1906, suggested the appointment of such a commission and later urged this appointment before the Committee. A sub-committee of five members, of whom the Mayor was one, was appointed to select and report to the Committee its selection of experts.

The Chairman of the Committee addressed a communication outlining the general telephone situation as presented to the Committee to the leading telephone journals or publications of the country, to the prominent technical and engineering educational institutions, and to the American Institute of Electrical Engineers of New York City and the Western Society of Engineers of Chicago, suggesting the submission to the Committee of names of persons of recognized ability to serve the City as experts, and not connected with any Bell or Independent telephone enterprise. Several names were thus submitted to the sub-committee, and after careful consideration of their qualifications the names of Prof. Dugald C. Jackson, Mr. William H. Crumb and Dr. George W. Wilder were recommended to the Committee for appointment, and at a meeting of the Committee, held January 4, 1907, the Committee concurred in such selection.

Prof. Jackson is a member of the Society of American Institute of Electrical Engineers, American Society of Mechanical Engineers and also American Society of Civil Engineers. He was formerly Professor of Electrical Engineering in the University of Wisconsin, and now occupies the Chair of Electrical Engineering in the Massachusetts Institute of Technology of Boston. He is also a member of the firm of D. C. and W. B. Jackson, Engineers and Experts of Madison, Wisconsin.

Mr. William H. Crumb received his education in Electrical Engineering at Cornell University. He was in the service of the Central Union Telephone Company for several years, engaged in engineering, construction and operating work. He was later General Superintendent of the Pittsburg and Allegheny Telephone Company of Pittsburg. Since 1901 he has been located in Chicago, acting as general telephone engineer, preparing specifications, making appraisals and investigations of telephone plants and taking contract work for both Bell and Independent companies.

Dr. Wilder is a graduate of the Department of Electrical Engineering of the University of Wisconsin. This education was supplemental by special courses in the Universities at Munich and at Zurich. He was formerly an instructor in the Electrical Department of Armour Institute of Technology and inaugurated the Department of Telephone Engineering of that institution. He is the author of several works on the subject of Technology and inaugurated the Department of Telephone Engineering of telephone apparatus, in making tests and appraisals for various telephone interests, in the construction and operation of telephone plants, and he now maintains an office in Chicago as a general telephone engineer.

The Commission organized on January 8, 1907, with Prof. Jackson as Chairman and Dr. Wilder as Secretary. Arrangements were made for an official stenographer for the Commission; and all information, data, figures, estimates and reports, in possession of the Committee, and a complete transcript of the Committee's proceedings up to date were placed in the hands of the Commission. The Commission was in session continuously from that time until April 4, 1907, when it made its report to the Committee on Gas, Oil and Electric Light. A complete inquiry was made with reference to telephone conditions, not only in this country but abroad. The Commission entered into correspondence with American Consuls to the leading foreign cities of the world, and in this way secured the most reliable information possible, with reference to the foreign situation. All available data was secured. Engineers and experts representing the interests of the Chicago Telephone Company and the Manufacturers' Telephone Company were given complete hearings and were requested to present all information and data at their disposal. Experts connected with other Bell and Independent companies were consulted and in some instances they appeared before the Commission. Members of the Commission visited other cities in order to secure ideas, advice and opinions from practical men, connected with such companies, who could not, or did not desire so to do, appear before the Commission. Much confidential information was secured in this way. The complete report is elsewhere presented in connection with this report.

Mr. William F. Burgess of Evanston, Illinois, formerly a resident of London, Eng., prepared for the Committee a special report on foreign telephone conditions. Mr. Burgess has had an extended experience in telephone matters through his connection with foreign telephone companies, manufacturers of telephone apparatus, and with engineering firms engaged in telephone work. For some time he was engaged in a study of telephone conditions in France, Germany, Sweden, Switzerland and other foreign countries. In 1905, he came to this country to study the telephone conditions as existing here. The Committee, at the suggestion of then Mayor Dunne, requested him to prepare a report setting out the conditions and giving general information with reference to the telephonic situation abroad. His report to the Committee is submitted with this report.

#### Examination Made of the Books and Accounts of the Chicago Telephone Company.

At one of the first meetings of the Committee for consideration of the telephone subject, a request was made of the Company to permit an examination of its books, records and accounts by the City, for its last preceding fiscal year. This request was taken under consideration by the Company's Counsel, Judge Payne, and at a meeting held February 28, 1906, he reported to the Committee that the Company would permit such an examination. A subcommittee was appointed to select a proper accountant. The matter was taken up with the City Comptroller and it was agreed that the work should be done under his direction. He immediately

detailed accountants for the work. Mr. Louis E. Gosselin, Deputy Comptroller, was placed in immediate charge of the work as auditor.

On March 27, 1906, Mr. Gosselin made his report to the Committee on the examination of the books of the Company for the fiscal year ending December 31, 1905. The report contains the following exhibits:

Balance Sheet; Analysis of the Plant Account; Statement of Real Estate and Buildings; Statement Showing Material on Hand; Record of Capital Stock Issued; Statement of Revenues from Chicago, South Chicago and Neighborhood Exchanges; Analysis of Pay-roll; Comparative Estimate of the Average Investments and Net Earnings for the Year 1905, based on a Revision of Plant Account and Expenses for said year; Statement of Operating and General Expenses, and Deductions.

The Auditor's Report has been carefully considered by the Committee, and it was submitted to the Special Telephone Commission in connection with other data for its consideration in the preparation of its report.

#### Increase of Cost of Telephone Service with Size of Exchange.

The average person does not understand why its costs more per telephone to supply telephone service in a large city than in a small city. The assertion of this principle to many seems a paradox. It is regarded as contrary to the ordinary principle of business—that is, that the unit cost becomes less as the volume of business done, increases. It is but natural to think that the wholesale principle ought to apply in the telephone business as in other lines. This idea prevails because the ordinary individual does not understand the peculiar features of the telephone business, and does not look beyond the telephone on the wall or on the desk. He does not take into consideration that the real business of a telephone is to furnish service, transmit messages, and not merely to rent instruments. This prevailing idea has been constantly brought home to members of the Committee by having their attention called by people thus uninformed to the lower rates existing in other cities; cities between which and Chicago there can be no common basis of comparison. Attention is called to some of the reasons for this exception to that rule of business, so well established.

Every line added to a telephone system requires the addition of telephone central office equipment to every other line in the exchange, so that the new line may be connected to any one of the existing lines.

For every line added to an exchange, the Company must  
552 not only handle the additional calls originating from that line but must provide for the additional calls originating from existing lines to the new line. The average number of calls per telephone increases with the opportunities presented for calling.

The size of a switchboard to serve a given number of subscribers depends upon the number of messages handled and not upon the number of subscribers. It is also true that the number of operators necessary depends upon the number of messages sent and not upon



the number of subscribers. It is therefore impossible in a large city to locate the lines of all subscribers in a single exchange. Mechanical difficulties interfere. In small cities one exchange is usually sufficient to supply the demand for service.

The subdivision of a city into exchange districts, with an exchange in each district, necessitates a complete system of inter-communication between each such district and all of the other districts. The complexity of switchboard wiring and the multiplicity of trunking facilities form very expensive items of plant installation. It also necessitates the handling of a very large percentage of messages twice. In a large city a very small proportion of calls are completed within a single exchange. It is usually conceded that about eighty per cent. of such calls are required to pass through a second exchange. It is thus plain to see how both the investment and the operating cost are accordingly increased.

In a small city the business day is longer and there can be said to be no excessively busy hours. In a large city the greater volume of the business is transacted in a comparatively short period of time. The plant must therefore be constructed, and the operating force provided, to meet the business demands of the high tension hours—to meet the “peak.” If the increased business of the busy hours could be spread over the full business day it would greatly decrease both the investment necessary and the cost of operation.

An enlarged exchange means an enlarged area covered and, therefore, added length to subscribers' lines. This requires a proportionate increase of investment for wires and equipment.

A large city usually has a greater percentage of paved streets, and makes more extended requirements for underground work. Thus is increased the investment necessary for installation of the system and the expenses of maintenance incident to the repairing of wires and cables placed underground.

There are additional causes for the increased cost of service, such as higher wages and shorter hours; destruction of underground cables by the interference of foreign electrical currents; higher rates of taxes and insurance; probable higher rates of compensation, and some additional investment for the benefit of the City, in providing space on poles, and ducts and cables, for the City's use.

In the United States, there are but few cities, and perhaps but one, New York City, which present conditions making a fair basis of comparison with Chicago regarding telephone rates. No fair comparison can be drawn between Chicago and European cities. There, the grade of service is of lower efficiency and the character of equipment, inferior. The cost of installation, maintenance and operation is much less on account of lower prices paid for labor. The hours of labor are shorter in the United States, and the companies furnish to their operators conveniences and comforts, such as reading rooms, rest rooms, and dining rooms where substantial lunches are served without cost, which are not furnished in European cities. Taking into consideration these facts, it seems unreasonable to compare our rates with those of foreign cities.

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556 City to Receive all Profits Over Ten Per Cent. on the Average  
Net Investment of Any Year.

A provision is inserted in the proposed ordinance which will serve as an automatic regulation of rates. It is made a requirement of the ordinance that all net profits over ten per cent. on the average investment of any year shall be paid to the City. Manifestly, if the Company finds itself able to make more than ten per cent. on its average investment, under the rates fixed by Council, it will voluntarily reduce its rates, thereby making its service more popular and increasing its business. If it fails to do so the City gets the excess profits. The ordinance expressly states that this provision shall not be taken as an admission on the part of the City that a rate of income of less than ten per cent. on the average investment is not adequate or reasonable.

\* \* \* \* \*

560 The following tabulation compares the present schedule of rates with the schedule presented in the proposed ordinance:

*Business Service.*

Present:

Single-party line unlimited service, \$125.00 per year (with mileage).		
Single-party line, measured service:		
\$60.00 includes.....	600	messages
75.00 includes.....	900	messages
90.00 includes.....	1,200	messages
102.00 includes.....	1,500	messages
114.00 includes.....	1,800	messages
All above 1,800 at 3c.		

Proposed:

Single-party line, unlimited service, \$125.00 per year (without mileage).	
Single-party line, measured service, \$60.00 includes 1,200 messages; next 2,400 messages at 3 cents each. All above 3,600 at 2 cents.	

*Residence Service.*

Present:

Single-party line, unlimited service.....	\$100.00 per year
Two-party line, unlimited service.....	75.00 per year
Four-party line, unlimited service.....	60.00 per year

Proposed:

Single-party line, unlimited service.....	\$72.00 per year
Two-party line, unlimited service.....	56.00 per year
Four-party line, unlimited service, abandoned.	

*Nickel Prepayment Service.*

## Present:

Single-party line .....	30c per day includes 6 messages
Single-party line .....	20c per day includes 2 messages
Two-party line .....	20c per day includes 4 messages
Two-party line, residence.....	10c per day includes 1 message
Four-party line, residence.....	10c per day includes 2 messages
Ten-party line, business.....	10c per day includes 1 message
Ten-party line, residence.....	5c per day includes 1 message

## Proposed:

Single-party line .....	20c per day includes 4 messages
Two-party line .....	15c per day includes 3 messages
Two-party line, residence.....	10c per day includes 2 messages
Four-party line, residence.....	5c per day includes 1 message
Ten-party line, abandoned.	

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561

*Report of Special Telephone Commission.*

CHICAGO, April 3, 1907.

To the Honorable Linn H. Young, Chairman, and Members of the Committee on Gas, Oil and Electric Light of the City Council of the City of Chicago.

GENTLEMEN: We have industriously worked at the problems which you laid upon us at the time of our appointment as a commission to advise you on matters relating to the telephone situation in the City of Chicago, and by instructions from time to time since, and we beg leave to hand you our report.

A telephone company in a large city must face a problem in many respects more complex than that of any other public utility corporation. The water department is called upon to sell a single commodity, namely, water, and at prices which are fixed with comparative readiness. The gas company also is called upon to sell a single commodity, metered for nearly every customer, and its conditions in dealing with customers are relatively simple. It may sell some additional by-products, as coke, tar and ammonia, but the quantities and market values of these are readily arrived at. The traction company has a more complex problem than some of the other purveyors of public utilities, but even here the price paid by the several patrons is uniform and the substantial difference between patrons lies only in the lengths of the rides which they may choose to take.

The telephone problem, on the contrary, involves many complexities, partially caused by the relatively large number of classes of service which the telephone company must offer to its patrons for the purpose of fully developing the telephone service of the city, and partially by the intangible character of the electric medium with which the telephone business is carried on, the delicacy of the apparatus used, and the wide differences in the manner and extent of the use of the apparatus by the various subscribers.

562 If a telephone company properly extends the telephone service in the city, it must be prepared to take care of the requirements of a range of patrons as wide as the interests of the city itself, including the largest business organizations, the hotels, the newspapers, the professional men, the small business houses, and residences of all classes. It must provide apparatus for the service of each class of patrons which will enable it to furnish the service to each subscriber at an appropriate price within his means. It is desirable for the prices to be graded so that the largest user shall not pay less than his fair share of the expense of maintaining the traffic and the remuneration to the company for its investment, and equally so that the smallest user may get his telephone service at a price which is within his means and yet is reasonably remunerative to the company for its outlay.

Telephone service has been of remarkably rapid development and extension in this country. Less than fifteen years ago there was no telephone exchange system with as many as 10,000 subscribers served by the system. At that time the number of telephones in Chicago was considerably under 10,000. Only seven years ago there were less than 25,000 telephones in Chicago, and at that time the present tremendous rate of growth in the number of telephones began, the average increase during the last five years being at the rate of approximately 20,000 telephones per year. A similar increase in the growth of the number of telephones began in New York City a couple of years earlier. The bends upward in the curves showing the numbers of telephones in Chicago and in New York are plainly evident on our Chart No. 4. The rapid expansion of the telephone service began in Chicago in 1900, and approximately two years earlier in New York.

Prior to the time when the rapid increase in the number of telephones began, the telephone art had been steadily changing, and the increased rate of expansion of the telephone service began approximately coincidently with the introduction into the great cities of the modern so-called "common battery" method of telephone operation. The prior apparatus used for telephone service was more expensive to operate and maintain, less convenient for the user, and not adapted for the extended use to which the telephone is now put in the large cities—all of which prevented the telephone service from becoming fully developed. The subscribers were not as well satisfied with the service which could be afforded them by the older apparatus and it was also necessary to charge higher prices.

563 During the recent period of tremendous growth which has followed the introduction of the "common battery" method of operation, accompanied by a service of greater convenience and lower prices, the telephone companies of the larger cities have been practically submerged in an effort to keep ahead of the demands of the people for additional telephones, and the problems relating to classification of service and appropriate charges for different classes of service have not been worked out in a suitable manner. The telephone companies have apparently been fully engaged in the extension of their business and the extension and improvement of their

plants, and they have not found men or time to work at the details of operating economies and the best methods of handling the service of different classes of subscribers in the way that railroads, traction companies, electric light companies and various other public utility companies have been working out the details of economies relating to their processes of operation.

The telephone business is not only an unusually complex one, but the records of the existing telephone company doing a large business in Chicago are lacking in details which are needful for the fixing of specific scales of charges for different classes of service. We have endeavored to obtain data bearing on the cost of specific classes of telephone service from other telephone companies, including the Bell Telephone Companies of New York and elsewhere, and also from certain of the so-called Independent telephone companies, but in no instance have we been able to obtain records kept in such detail or in such manner as to afford appropriate data for fixing rates, and in every instance the rates seem to have been dictated by estimates based on experience or the requirements of business expediency, instead of being founded on a knowledge of the cost of the different classes of service. The telephone companies seem to go on the belief that their business is satisfactory if the total results of each year's business show a profit, and that it is unsatisfactory if the year's business does not show a profit, and they have heretofore apparently neglected to consider more than superficially the essential question whether the rates charged deal fairly by the different classes of subscribers.

The telephone art is by no means stable. In most of the well developed lines of industry, the art is on an advance but is advancing at a substantially stable rate. This is the condition, for instance, of the railroad art. No unforeseen or unanticipated revolutionary changes are momentarily expected to occur in the railroad art on account of discoveries or inventions, but the telephone art is different. The telephone service is now expanding at its tremendous rate largely on account of the introduction of the common battery system of operating telephones, and other improvements of more or less revolutionary character are likely to be introduced into the telephone art from time to time for decades to come.

These conditions make it impossible to arrive at any satisfactory solution of the problem of telephone rates which may be expected to extend over a period of twenty years, and we, therefore, make recommendations to you which tend toward flexibility in the operations of whatever company may receive a franchise at the hands of your Honorable Mayor and City Council, but also reserve to the city a proper degree of authority in respect to rates.

The questions laid upon us by your instructions divide themselves into four categories:

1. The feasibility of the proposed project of the Manufacturers' Telephone Company;
2. The relative merits of flat rate and measured rate telephone service;

3. The application for a franchise made by the Chicago Telephone Company;

4. The advisability of requiring universal toll connections by ordinance.

We have treated these four branches of our inquiry in the order given.

The time at our disposal was limited, but we have gone into the questions involved as deeply and as thoroughly as the time would permit.

We have called on the City Auditor, Mr. Louis E. Gosselin, and City Statistician, Mr. Hugo S. Grosser, for assistance, and we wish to thank them for their courtesy in aiding us in several directions. We also have conferred constantly with Alderman Linn H. Young, chairman of your committee. We have made numerous requests (courteously granted in most instances) for information and data from the Engineer of the Manufacturers' Telephone Company, Mr. W. H. Johnston, and from the General Manager and Engineer of the Chicago Telephone Company, Mr. A. S. Hibbard and Mr. J. G. Wray. We have also informally consulted a number of other engineers of well recognized experience and capability in the telephone art, particularly several men connected with large Independent telephone installations.

Our conclusions are set forth in the last part of this report, and in the intervening portion we have given reasons for the conclusions, which we have illustrated by some maps and charts 565 & 566 chosen from a large quantity of data which we gathered together. We believe that our conclusions are founded upon the best information which is available in the telephone world, and we have introduced the particular charts in our report for the purpose of illustrating the reasons for arriving at these conclusions.

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## II.

### The Relative Advantages and Disadvantages of Flat Rates and Measured Rates for Telephone Service.

In order to give the best possible telephone service, the following features should be maintained at the highest possible standard by the company furnishing the service:

The telephone plant should be engineered and constructed along broad lines, and with ample facilities for handling the business and taking care of future development.

There should be provided suitable means for quickly and accurately connecting and disconnecting subscribers' lines.

There should also be provided suitable means for accurately signaling the subscriber desired without the knowledge of any other subscriber.

All lines should be free from inductive disturbances, and of sufficient carrying capacity to provide for a high standard of transmission.

The speech transmitting and receiving devices should be of the best quality, and carefully maintained.

The plant should be well constructed and maintained.

The number of cut-offs which interrupt communications should be reduced to a minimum.

The number of "busy reports" and other unavailing calls should be reduced to a minimum.

All interference with conversation between subscribers should be reduced to a minimum.

The work required of the subscribers should be reduced to a minimum.

All of the plant employed in providing service should be under the control of one corporation or organization.

The company furnishing the service should provide courteous treatment to all of its subscribers, and should promptly and fully follow up and satisfactorily adjust all complaints.

An accurate directory of subscribers' telephone numbers should be provided.

The term flat rate in telephone service ordinarily means the manner of charging for service which consists in making a fixed charge per year for furnishing the subscriber with a telephone instrument in his place of business or residence, and a suitable line or lines and means for connecting, so that he may converse with other subscribers at will. This price is a survival of the idea that a telephone company rents apparatus and telephone lines, and is based upon the theory that the cost of providing service for any subscriber to a particular class of service will be very nearly equal to the average cost in that class of service. The subscriber with this arrangement is authorized to make as frequent or infrequent use of his telephone as his requirement or convenience warrants, and all subscribers of the same class are presumed to pay the same price. The warrant for this equality in the price charged subscribers who may make use of their telephones in widely different degrees, lies only in an assumption that the expense of the service is almost altogether a matter of providing the lines and the apparatus, and that the cost of providing each subscriber's service is practically independent of the number of times the instrument may be used for communications.

569 By measured rate service is ordinarily meant a service which is carried on upon the assumption that the telephone company is organized for the purpose of giving telephone service, as distinguished from the renting of instruments and lines. This, in our view, is clearly the proper duty of the telephone company, and any franchise granted to a telephone company should be drawn from this view. The provision of instruments and lines, and the other articles of equipment of the telephone company, is made purely for the purpose of enabling subscribers to transmit messages between each other with the greatest practicable convenience and dispatch. It is therefore the transmission of messages which constitutes the duty of the telephone company, and the measured rates go upon the assumption that the telephone company should be paid for the performance of this specific duty.

In connection with the measured rate service it is, of course,



obvious that the company must furnish its subscribers with suitable telephone instruments and lines, and also provide the necessary equipment for making connections to complete the intercommunications between subscribers, and for this reason it is appropriate for a company making measured rate charges, to exact a guarantee that there shall be not less than a fixed minimum number of messages or that the rate paid for service at each telephone shall not fall below a certain reasonable amount per annum. This amount will include the transmission of messages up to an appropriate number, over and above which an additional small charge may properly be made per message.

The ideal method of charging for telephone service is obviously to charge each customer in proportion to the service he receives from the company, and to make the charges of all customers as low as is consistent with the operation and maintenance of the property, and the payment of a fair return on the money invested. When flat rates are charged, two classes of customers are ordinarily differentiated, namely (a) business customers, and (b) residence customers. In each class there may be subdivisions due to the arrangement of individual customers on a single line, or two, three, four or more customers on a party line, but none of these subdivisions can be made except on the basis of differences in the amount of equipment required for each customer. It is true that the differentiation between a business customer and a residence customer, which is oftentimes made, is justified on the ground that the residence use of telephones averages smaller than the business use, but no grading as between

the different business establishments, or between one residence  
570 and another, can be made by that process when flat rates are adopted as the method of charging the subscribers. The result of this obviously must be, assuming that a company's total receipts are sufficient to pay for the cost of operating and maintaining its property and paying interest on the money invested, to give some of the customers on the flat rate a great deal more service than others receive, so that the smaller users manifestly pay more than their service should require, while the larger users who keep their telephones constantly busy, receive a service of much greater value and expense to the company than is justified by the annual bills which they pay. These large consumers under the flat rates also interfere with the traffic of the smaller users by keeping their lines so busy that the smaller users are unable to conveniently get into conversation with the busy lines, thus causing unavailing calls for connections which are expensive to the company and annoying to the customers.

The greatest range of rates that it is possible to make with the flat rate arrangement is relatively small, the difference between the highest paying flat rate customer and the lowest paying flat rate customer being comparatively small, and this tends to retard telephone development and prevent its general use.

The measured rate arrangement manifestly makes it possible to reduce the price of the telephone to the small user to the smallest possible annual charge, that is, to a charge which is just sufficient to cover a reasonable interest and depreciation for the portion of



the plant that must be set aside for the use of that individual user (or the average of the users in his particular class), increased by an amount which is proportional to the actual number of messages transmitted from his telephone in the year. It is only by this arrangement that large city service may be extended to the small business men and the small residence and apartment dwellers who may be unwilling to pay more than from eighteen to twenty-four dollars per year, and this sort of customers constitutes a remarkably large proportion of the total telephone using population of a large city like Chicago. When the measured rates are introduced exclusively, and carried to their logical conclusion, it may increase the cost of telephone service to the largest business users, but these users are even then charged no more than the actual service rendered to them costs the company, plus an appropriate amount to represent interest on the investment; and it is an obvious business principle that each class of service should not only be satisfactory to the users, but should also return its reasonable proportion of remuneration to the company furnishing the service.

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571-573 The difference thus arising between flat rates and measured rates is very marked. The flat rate telephone user tends to increase his number of messages as the system enlarges, so that the average calls per day per telephone may be expected to increase and the proportion of unavailing calls also to increase. The consequence is that the company is forced to handle more calls per telephone as the system becomes larger, and the price per telephone has to increase under flat rate charges; while the subscribers limit their use of the telephone to their actual needs under measured rates and the number of calls per telephone does not have a tendency to increase as the system increases in size after it has reached a considerable development such as is now found in the City of Chicago. Under these conditions the principle of wholesale production makes it possible for the company to reduce its cost of operating per message and thereby reduce the average price charged the telephone subscribers.

The telephone hanging on the wall appeals to the average telephone subscriber as constituting the total expense to the company through the maintenance of the instrument and lines. The maintenance and the interest on the equipment does constitute a considerable expense to the company, but a great deal of the expense to the company is due to the actual cost of handling each message. This expense composes a large proportion of the annual expenditures of the Chicago Telephone Company.

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574 We have pointed out earlier, certain cogent reasons why the line of the average flat rate subscriber costs the telephone company, as a rule, more than the line of the average measured rate subscriber, largely on account of the overloading of the lines and the increase of the unavailing calls by the flat rate subscribers' use; and the foregoing study of the load curves indicates farther that the

way in which the calls become distributed in the system makes it possible for the telephone company to arrange its operating force more economically to take care of its present measured rate service, and therefore actually enables the telephone company to make the cost of operating less per individual call of the measured rate service than it can for the flat rate service.

On the flat rate basis the telephone subscriber who makes calls over his telephone line twenty or more times per day (perhaps even fifty or one hundred or more times) pays the same price as the subscriber who uses his telephone only eight or ten times a day, and the flat rate being an average rate which enables the telephone company to come out at the end of the year with its expenses all paid and a balance to pay interest on its investment, it is obvious that the small user pays more for his telephone than his use makes necessary and the largest user pays less for his telephone than his service

575 probably costs the operating company. This is so manifestly unfair that there can be no justification in maintaining a strictly flat rate telephone charge in large cities, with the present known methods of operating. Such charges for telephone service are as unjust as similar charges would be if made for electric light or gas. It will be recognized as absurd to suggest that a gas company should charge a fixed rate per year for each gas burner in a place of business, regardless of the number of hours that the place of business is open. The difference between the amount of gas used per burner in a store that closes at 5:30 p. m., and in a saloon which closes at midnight, or between an office which is on an upper floor of some well appointed and well lighted office building and a shipping room which is in the basement of the same building, are so great that it is manifest that this flat rate method of charging would exercise the utmost injustice between customers—affording a long hour user a large amount of gas at a price which might not pay the company for the expense of the manufacture thereof, while the short hour user, paying the same price per burner, would be paying an extremely excessive price per cubic foot for the gas in order that the losses entailed by the long hour user should be recouped to the company. This method of charging was in vogue by electric light companies in the earlier days of electric lighting, before electric meters were reasonably perfected. It was then usual to charge business houses a fixed rate per incandescent lamp installed and connected to the lines, and residences a different and smaller rate per incandescent lamp installed, the assumption being that the residence would use the lights for fewer hours per day. This method of charging brought many electric light companies to the verge of bankruptcy, and as long as it was in vogue electric lighting remained a luxury. With the advent of charges for actual consumption (that is, measured rates), electric light came within the reach of the greater proportion of people who now use it, and the expansion of the electric lighting service was brought to a reasonable mark.

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576 We have allotted a great deal of time to the study of this question of rates, and are convinced that the general use of  
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measured rates results in improvement in the service by the reduction of unavailing calls and also results in the reduction of the average cost to the consumers through the elimination of useless calls from the various stations, and makes it possible to place the lowest rate for the least expensive service within the means of the largest possible number of people. We are also convinced that the general adoption of measured rate service will bring about a more uniform rate of calling during the day, which will make it possible to ultimately reduce the price per message, thus bringing about a further reduction in the average cost of telephone service and especially a reduction to the large class of users which subscribe for telephones of the lowest cost.

A partial application of flat rates is practicable in connection with business telephones which have sufficient service to make it worth while to set aside a special line or lines for outgoing calls only, since such lines do not interfere with the convenience of others, and do not cause a piling up of unavailing calls, because their busy state in no wise affects calls coming from other lines. Such flat rate outgoing service lines must in each instance be accompanied by a sufficient number of incoming lines, to be furnished at a relatively small rental. A partial application of flat rate service may also be applied

in connection with residence telephones and with neighboring exchange telephones, and is here justified because the restricted character or restricted circle of use makes the average calling rate per telephone relatively small and approximately equal for all users of the same class. In connection with residences this use of flat rates in a large city has some serious disadvantages, but its advantages probably overcome the disadvantages.

We gave some consideration to the telephone rates and grades of service in foreign countries; but found no basis for useful comparisons. The London telephone system is the only one comparable in size with the service given in Chicago, and it has only recently been brought to comparable magnitude. The measured rate seems to be there preferred by the engineers. The service in Paris and Berlin is notably bad and the numbers of telephones are few. In some of the smaller foreign cities the service is apparently good, but good foreign service does not partake of the speed and accuracy demanded by American telephone subscribers. The slower speeds reduce costs; zone charges are commonly used, and the wages of employes are lower; and it is impossible to make an intelligent analytical comparison of the foreign with American rates.

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579 The application of the Chicago Telephone Company is complicated by the license contract which the company has  
580 with the American Bell Telephone Company, and also the contract with the Western Electric Company whereby the latter company acts as purchasing agent for the Chicago Telephone Company. We have therefore given extended consideration to these two points.

The contract with the American Bell Telephone Company ex-

tends back to the early days of the Chicago Telephone Company's existence, and was originally drawn to cover various business relations based on the exclusive license of the Chicago Telephone Company to operate within its territory under the fundamental Bell and other telephone patents. The contract originally included royalty charges at a figure which would be extremely high to-day, but these have been gradually reduced. The earlier patents have been expiring from time to time, and the contract has been correspondingly modified. The American Bell Telephone Company continues to furnish and maintain the telephone transmitters (with accompanying induction coils) and receivers used by the Chicago Telephone Company, and to perform other services besides licensing the latter company to operate under existing patents, and the payment for these services and the license is being made by the Chicago Telephone Company at the rate of  $4\frac{1}{2}$  per cent. of its gross receipts. The amount paid during the year 1906 aggregated \$351,860.68 for the entire territory of the Chicago Telephone Company, according to the statement of the company's auditor, of which \$282,246.32 was paid on account of the business within the City of Chicago.

The Chicago Telephone Company reports that it had in use and in stock during the year 1906, an average of nearly 195,000 telephone sets in its entire area, and we estimate that over 150,000 of these were on account of the Chicago business. These telephone sets, each comprising a transmitter, receiver and induction coil, are worth approximately three dollars per set, and are furnished and partially maintained free to the Chicago Telephone Company by the American Bell Telephone Company, under its contract. The depreciation on these is large, and it is generally considered that the average life does not exceed a period of between six and ten years, so that the depreciation allowed should be between ten and sixteen per cent. A maintenance figure of three and one-half per cent. per year is small for the part of the American Bell Telephone Company. Interest, insurance and taxes will probably cost eight and one-half per cent. more. Taking an average rate of twelve per cent. for

depreciation, making due allowance for the scrap value, and  
 581 allowing eight and one-half per cent. for interest, insurance  
 and taxes (of which two and one-half per cent. is allowed  
 for the latter two items), and three and one-half per cent. for main-  
 tenance, makes a total annual item of cost to the American Bell  
 Telephone Company for furnishing these pieces of apparatus to the  
 Chicago Telephone Company that amounts to twenty-four per cent.  
 of their first value of three dollars per set. As the Chicago Tele-  
 phone Company, in the Chicago business, has now (January 1,  
 1907) more than 131,000 telephones in actual use, we assume that  
 our estimate of an average of 150,000 complete telephone sets in use  
 and in stock during 1906, is approximately correct, though we have  
 not had time to verify this figure. At three dollars per set, the total  
 value of these 150,000 sets is \$450,000.00, and twenty-four per cent.  
 of this amount is \$108,000.00, which is a fair payment to the Ameri-  
 can Bell Telephone Company for furnishing these instruments.

This leaves a balance of approximately \$174,000.00 in the license account.

The Chicago Telephone Company urges that they get the value of this sum through the engineering work which is done for them by the American Bell Telephone Company and the American Telephone and Telegraph Company, which is an offshoot of the American Bell Telephone Company, and also through the associations with the other great Bell telephone operating companies, and especially the companies at New York, Boston and Philadelphia, from whom they are at liberty to ask for information through their Bell Telephone Company relations. The company's engineers report that they receive working specifications for switchboard installations, line and conduit work, pole line construction, cable construction, building materials, etc., etc., of which several hundred specifications are now on file, and others are being furnished from time to time; and bulletins are supplied, treating of engineering practice and operating methods which summarize the experience and practice of the various large Bell telephone companies. Special studies of the best methods of operating are carried on whenever the occasion arises, by the engineers of the American Bell Telephone Company, and that company maintains a well equipped laboratory in Boston, wherein tests and investigations are carried on for the benefit of the local companies. All of which service is rendered without direct expense to the Chicago Telephone Company, and paid for through this so-called royalty account.

It is also urged that a portion of this payment is justified on account of the exclusive license to use, in Chicago, apparatus coming within the patents of the American Bell Telephone Company  
582 and its offshoots. The most important of such patents which are now in force is probably the Pupin patent for improving telephonic transmission by the use of what are called "loading coils," and we believe that this is of material financial value to the Chicago Telephone Company by enabling that company to reduce the cost of the copper wire in its cables and especially in its trunk conductors which lead from each exchange to the other exchanges.

In our opinion the advantages derived from this contract by the Chicago Telephone Company are worth a very considerable sum of money. We are not prepared to make an exact estimate of its value without time for additional investigation.

Under the terms of the contract, the company is permitted to carry on hand, without extra charge, an additional number of telephone instruments equal to three per cent. of the total number of instruments in service, but all additional telephones carried in stock in excess of three per cent. must be paid for at the rate of 81 cents per set per year. The company's business is growing at the rate of over 20,000 telephones per year, and the three per cent. does not permit it to keep on hand enough instruments to carry on the business without paying royalties on telephones from which no revenue is received. This rate of growth and the other exigencies of the business require the company to keep on hand additional instruments equaling in number about ten per cent. of the

number of instruments in use, and we believe that these should be supplied under the contract without the extra charge.

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583 & 584 It is our opinion that the aforesaid two contracts which the Chicago Telephone Company has heretofore made respectively with the American Bell Telephone Company and with the Western Electric Company are not harmful, but enable the Chicago Telephone Company to improve its service and purchase its supplies at a less expense than it otherwise could.

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585 It is well understood that operating plant is limited in life, and (however well ordinary repairs have been kept up) after a period of years the generally worn out condition of the equipment or the advance of the art makes a substitution of new equipment desirable and economical. The expense of this substitution which does not increase the gross earning capacity cannot be fairly charged to capital account, but should be defrayed out of a suitably supported depreciation fund which has been gradually accumulated out of the earnings during the life of the equipment, and which, at the end of the life period, has become equal to the first cost of the original equipment diminished by the amount of any "scrap" value or salvage which may be obtained from the discarded equipment. Interest accretions will add to the amount as the fund grows, and the annual sum set aside out of the earnings should be adjusted with this in view. Three per cent. is a conservative rate of interest to set as the minimum which ought to be accepted on the moneys of a trust fund, within which category this depreciation fund belongs, and our table is computed on the basis of that percentage.

586 A higher rate of interest would obviously decrease the size of the annual contributions to the fund which must be made from earnings, but it is not safe to count upon a higher rate of interest being procurable for a trust fund.

The rate at which the telephone art is advancing, and the delicacy of the apparatus used, makes it a matter of particular importance for a telephone company to establish a proper depreciation fund. Depreciation is distinct from maintenance, which latter includes current repairs that are required to keep the plant in first-rate working order as long as it is economically workable at all.

When dealing with reconstruction we have tried to arrive at the best judgment of the effect of future street and park improvements on the existing plant of the Chicago Telephone Company; and we have given due consideration to the fact that the telephone conduit and cable equipment in the heart of the city is likely to be soon disturbed by the construction of street railway subways.

The computations of the Commission are made on the basis of the original cost of the tangible property, excluding land, stock of materials and cash on hand, owned by the Chicago Telephone Company within the City of Chicago at the end of 1905. This differs from the "book value" of the same part of the property by an amount equal to the sums heretofore written off for depreciation. We consider it proper to make our estimate of the depreciation rate



on the basis of the first cost. The percentage values attributed to the depreciation fund will be approximately the same for other years, and are applicable to present conditions within the City of Chicago. We have taken the estimate of the relative values of the different subdivisions of the plant as set forth by the engineers of the Chicago Telephone Company. An independent verification of the accuracy of these subdivisions of the total cost was impossible on account of the limited time at our disposal, but they appear to us to be reasonably accurate.

Table No. 8 gives our estimate of the Depreciation and Insurance Fund. The percentage of the plant cost to be set aside each year for a reserve for depreciation, reconstruction and special insurance aggregates 8 per cent. Of this, the depreciation reserve is  $5\frac{3}{4}$  per cent. of the cost of the plant, and the reserve for reconstruction and insurance is  $2\frac{1}{4}$  per cent.

The first column of Table No. 8 names the subdivisions of the plant; the second column gives the value of plant in each subdivision; and the following columns contain our estimates. As shown in the table, the life of underground conduit is long, but it affords no salvage. The reconstruction expense which we estimate for conduit includes the effect of sewer construction, park improvements, etc., and the probable effect of the future construction of street railway subways in the heart of the city. The salvage of cables is high on account of the relative ease of removing cables and the large percentages of recoverable copper and lead which they contain. The reconstruction estimate for cables is made to cover the effect of sewer construction, park improvements, etc., and street railway subways. Pole lines and their appurtenances are relatively short lived. There is very little salvage except from the aerial copper wires and cables. The reconstruction estimate is made with a consideration of street and park improvements, future extension of the underground boundaries, track elevation, etc.

Private branch exchange and central office switchboards are of notably short average life on account of the rapid rate at which the art is advancing, but the salvage is considerable because parts of the old equipment can be modified for use in the construction of the new, or the discarded equipment sometimes has a value for use in less important centers. The estimates set down in columns 7 and 8 in connection with the switchboards and subscribers' instruments, are made to cover fire insurance in excess of that which can be carried at reasonable rates with the underwriters.

The total of our estimates for reconstruction and insurance is somewhat over half as large as the corresponding total of the estimates presented by the Chicago Telephone Company, but the engineers of that company have included in their estimates some expense caused by the moving of customers and the like, which belongs in ordinary maintenance and is not a proper charge against this fund.

This Table No. 8 is made out on the plant values of the Chicago Telephone Company, but we believe that the final figures obtained



from the computations are reasonably applicable to any similar telephone plant located in Chicago.

The underground district to be required of any company receiving a franchise has been defined to conform with the lines agreed to by the Chicago Telephone Company in conference with your committee. The boundary of this district is shown by the full line in Map No. 2. The underground district fixed by the terms of the Chicago Telephone Company's ordinance of 1889 is shown by the dot and dash line of the same map; and the boundary of the underground district defined by the proposed ordinance printed by the

Manufacturers' Company is shown by the dotted line. In 589-591 our understanding that the Manufacturers' Company have undertaken to extend the boundary of their proposed underground district to bring it to coincide with that of the Chicago Telephone Company's proposed boundary.

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V.

### *Conclusions.*

1. The project of the Manufacturers' Telephone Company is not feasible, because

(a) A plant to replace the service of the Chicago Telephone Company could not be constructed in less than double the time available, and even that minimum of time would be so short as to result in confusion and inconvenience during the early months of operation of the new plant.

(b) The semi-automatic mode of operation proposed by the Manufacturers' Telephone Company is substantially untried as a commercial arrangement for use on a large scale. It bears indications of being a desirable method of telephone operation, but it has not yet been fully developed and it is unwise to make an experimental trial in so large a plant as that required to give service to the entire City of Chicago. Even if the apparatus adopted ultimately proved successful, the confusion resulting from defects which always appear in new and untried apparatus would probably produce confusion for many months after the plant was put in operation.

(c) The methods of charging and rates proposed by the Manufacturers' Company are not adapted to enable the company to 593 give first class service throughout the city and pay ordinary interest on the investment, after setting aside reasonable reserves for depreciation and contingencies, and the company's operations, if extended throughout the city, would ultimately result in financial difficulties or an application to the Council for the privilege of changing their schedule of rates.

2. Measured rates should be adopted for general service, because

(a) They require each user to pay for his service in proportion to what he uses. This makes it possible for the telephone operating company to base its rates for each class of service on the actual cost of the service, thereby bringing the service within the means of the

largest number of people and expanding it so as to be of the maximum usefulness in the city.

(b) Measured rates largely cut off frivolous and otherwise useless messages, thereby leaving the subscribers' lines open for all important messages.

(c) The reduction of calls per telephone following the general use of measured rates results in a great reduction of the unavailing calls, which are now approximately one-third of the total calls in Chicago, and it thereby reduces the expenses of operating, and this makes a general reduction in the rates practicable.

(d) The introduction of measured rates tends to level off the load curve, reducing the relative height of the peaks, so that the actual cost of operating for each message passed through the hands of the telephone company becomes less, and this also tends towards making a reduction in the price of telephone service practicable.

3. A partial use of flat rates may be applied in connection with residence and neighborhood exchange telephones because

(a) These telephones are subject to a smaller average use than city rate business telephones and the flat rates applied to them do not so seriously increase the unavailing calls; also the use of the individual telephones in these classes does not differ so greatly from the average use.

4. Three-party line residence telephones at fifty-one dollars per year for each telephone are recommended for trial, as an addition to the schedule of rates proposed by the Chicago Telephone Company, in case that company is granted a franchise.

(a) The management of the Chicago Telephone Company argues cogently that experience demonstrates that four-party line flat rate residence telephones cause bad service on account of the overloading of the lines unduly increasing unavailing calls, and on  
594 account of the mutual interference with each other which occurs between subscribers.

(b) They admit that two-party line flat rate residence service is satisfactory.

(c) We believe that three-party line flat rate residence service will give reasonably satisfactory service and will be popular, and recommend its trial on that ground.

5. We condemn the service of more than four parties on any line, because

(a) It produces bad results from overloading the lines and from mutual interference between subscribers.

6. The Chicago Telephone Company has a desirable plant in use and can give good service. We have consulted with Mr. Maclay Hoyne, who has outlined an ordinance which we believe will result in obtaining for the people of the city good service at a minimum cost in case the Chicago Telephone Company is granted a franchise.

We direct your attention particularly to the schedule of rates and to two alternative means which we believe will afford satisfactory control of rates.

(a) The first reserves by contract the right to the City to reasonably regulate rates at certain intervals.

(b) The second limits the net earnings of the company and requires any excess of net earnings over the limit to be paid to the City.

7. We recommend that in case the Chicago Telephone Company is given a franchise, the company be required to start a separate set of records and books of account relating to its business within the City of Chicago, and that these shall be arranged so as to afford data for determining the average costs of the several classes of service.

(a) For this purpose we have proposed that the accounts and records shall be kept in a manner satisfactory to the City Comptroller.

(b) And we further recommend the employment by the City of a consulting engineer to advise with the Comptroller and the company upon the best form of records to be kept, in order that the costs of the different classes of service may be reasonably well known after the end of two years.

8. We recommend that the City Comptroller, after two years place before the City Council a statement of the cost of service in the different classes as nearly as may be practicable, for the information of the Council in further regulation of rates, in case the Chicago Telephone Company is given a franchise with the right of regulation reserved to the City according to our first alternative.

9. To require an operating company to make toll connections with every applicant company does not seem to us practicable or desirable for several reasons, of which the following are sufficiently conclusive:

(a) Business harmony must exist between companies doing a joint toll business and the plant of each must be maintained to the satisfaction of the other, or the toll service will be seriously impaired or rendered valueless. The necessary harmony and unity of purpose cannot be obtained by ordinance.

(b) We have studied the toll situation within a radius of 100 miles from Chicago and find that this area, under present conditions, is well provided with telephone connections entering Chicago.

(c) Our inquiries show that "telephone free trade" is plainly not desired by the people of responsibility related to either the Bell or the Independent companies.

Respectfully submitted,  
(Signed)

DUGALD C. JACKSON.  
WILLIAM H. CRUMB.  
GEORGE W. WILDER.

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597 *Report of Linn H. Young, on Rates and Service.*

CHICAGO, November 27, 1906.

To the Committee on Gas, Oil and Electric Light.

GENTLEMEN: At a meeting of the Committee held October 10th, 1903, I suggested that I had collected, during the Council vacation, considerable information regarding telephone rates and service in large cities. The Committee requested that I put the same in form

and present it to the Committee. The information is hereto attached and respectfully submitted.

The figures on the population of the various cities were furnished by the City Statistician, Mr. Hugo Grosser, with the statement that they are the census estimates for 1904.

The telephone rates given for the various cities are taken from rate cards published by the companies, and in some cases from written communications from company officials. I regard the schedules as reliable.

The general information, outside of rates, was secured from officials of the different companies. The figures indicating the number of telephones operated by the various companies were secured in this way. No effort has been made to verify them by telephone directories or otherwise.

Trusting that the information may be of some value to the Committee, I am

Very respectfully,

LINN H. YOUNG, *Chairman.*

598

New York City and Brooklyn, N. Y.  
(Greater New York.)

Population, 3,888,000.

New York Telephone Company.

Manhattan and the Bronx Message Rate Districts.

District No. 1—Manhattan to 110th street.

District No. 2—110th street to the Bronx.

District No. 3—The Bronx.

A local message rate call is defined as follows:

From District No. 1—Any call within the area of Districts 1 and 2

and 3.  
From District No. 2—Any call within the area of Districts 1, 2

and 3.  
From District No. 3—Any call within the area of Districts 2 and 3

The rate for a message between Districts 1 and 3 is 10 cents.

### *Rates.*

Business or Residence—All Districts.

Direct Line:	Amount.	Excess
600 Calls.....	\$ 48	5 cent
800 Calls.....	57	5 cent
1000 Calls.....	63	5 cent
1200 Calls.....	75	5 cent
1500 Calls.....	87	5 cent
1800 Calls.....	99	5 cent
2100 Calls.....	111	5 cent
2400 Calls.....	123	5 cent
2700 Calls.....	135	5 cent

3000 Calls.....	147	4 cents
3300 Calls.....	156	4 cents
3300 Calls.....	165	4 cents
3900 Calls.....	174	4 cents
4200 Calls.....	183	4 cents
4500 Calls.....	192	4 cents
4800 Calls.....	201	4 cents
5100 Calls.....	210	4 cents
5400 Calls.....	219	4 cents
5700 Calls.....	228	4 cents

Residence—All Districts.

Business—Districts 2 and 3.

Two-Party Line:	Amount.	Excess.
600 Calls.....	\$42	5 cents
800 Calls.....	51	5 cents
1000 Calls.....	60	5 cents
1200 Calls.....	69	5 cents
1500 Calls.....	78	5 cents

Residence—District 2.

Four-Party Line:	Amount.	Excess.
600 Calls.....	\$36	5 cents

599 Philadelphia, Pa.

Population, 1,393,000.

The Bell Telephone Company of Philadelphia.

### Rates.

Business—Direct line, \$160 per year.

Unlimited—This rate no longer quoted. (There are about 2,000 stations under this service.)

Measured Service.

Direct Line:	Business Rates.	Residence Rates.
800 Calls.....	\$ 69	800 Calls.....\$ 60
1000 Calls.....	78	1000 Calls..... 69
1600 Calls.....	105	1400 Calls..... 84
1800 Calls.....	114	2000 Calls..... 105
3000 Calls.....	150	

Additional calls, business, up to 1,600, 5 cents; over 1600, 4 cents.  
 Additional calls, residence, up to 1,400, 5 cents; over 1,400, 4 cents.

Two-Party Line:	Business Rates.	Residence Rates.
600 Calls.....	\$ 48	400 Calls.....\$ 33
800 Calls.....	57	600 Calls..... 42
1200 Calls.....	75	1200 Calls..... 69
1800 Calls.....	102	

Additional calls, business or residence, 5 cents.

#### Zone Rates—Unlimited.

Business—Direct line, \$90; two-party, \$75.

Residence—Direct line, \$36; two-party, \$30; four-party, \$24.

(Flat rate in northern, eastern or western zone, with 5-cent charge to any other zone.)

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600

St. Louis, Mo.

Population, 625,000.

The Bell Telephone Company of Missouri.

#### Rates.

Business—Direct line, \$10.40 per month; two-party line, \$8.35 per month.

Residence—Direct line, \$5 per month; two-party line, \$3.50 per month; four-party line, \$3 per month.

#### Measured Service.

Business—Direct line, \$60 per year (800 messages, excess 3 cents); two-party line, \$48 per year (800 messages, excess 3 cents).

Residence—Direct line, \$48 per year (1,000 messages, excess 3 cents); two-party line, \$36 per year (800 messages, excess 3 cents).

#### Coin Device Service.

Business—Direct line, 15 cents per day guarantee, excess 3 cents each; two-party line, 12½ cents per day guarantee, excess 4 cents each; four-party line, 10 cents per day guarantee, excess 5 cents each.

Residence—Direct line, 12½ cents per day guarantee, excess 3 cents each; two-party line, 10 cents per day guarantee, excess 4 cents each; four-party line, 5 cents per day guarantee, excess 5 cents each; (all calls under guarantee, 5 cents each).

\* \* \* \* \*

Boston, Mass.

Population, 589,000.

The New England Telephone Company.

(There are two districts, the Metropolitan District including 7 telephone exchanges, and also the Suburban District which includes 6 other exchanges within the city limits and a large number of exchanges in suburbs near Boston. The rates for the Metropolitan District cover the territory of the Suburban District. The Suburban District rates are much lower but a 10-cent toll is required for talking into the Metropolitan District. A subscriber in the Suburban District can talk throughout both districts without toll in case he pays the Metropolitan District rate.)

## Metropolitan District Rates.

## Unlimited.

Direct Line—Business, \$162; residence, \$116.

Two-Party—Residence, \$90.

## Measured Service.

Direct Line—600 calls, \$60; excess calls, 5 cents.

Two-Party—500 calls, \$45; excess calls, 5 cents.

## Coin Service.

Four-party Line—Calls 5 cents each in Metropolitan District and 10 cents each into the Suburban District. A guarantee is required of \$3 per month for business and \$2.50 per month for residence.

The foregoing rates are for service within two miles of the Central office. A mileage charge is added beyond the two-mile limit.

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603

Baltimore, Md.

Population, 539,000.

Chesapeake and Potomac Telephone Company.

## Rates.

Direct line, \$125 per year. (No longer quoted.)

Measured Service—Business and Residence.

Direct Line:		Amount.	Excess.
600	Calls.....	\$48	5 cents
800	Calls.....	57	5 cents
1000	Calls.....	66	5 cents



1200 Calls.....	75	5 cents
1400 Calls.....	84	5 cents
1600 Calls.....	90	5 cents
1800 Calls.....	96	5 cents
2000 Calls.....	102	4 cents

Additional messages up to 4,000, at \$3 per hundred.

Two-party line, 30 messages per month, \$2.50 per month and 5 cents per message excess.

#### Residence Only.

Four-party line, 600 calls, \$36 per year and 5 cents each for excess calls.

#### Unlimited Service—(Residence).

Direct line, \$48 per year.

Two-party, \$36 per year.

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604 & 605

Cleveland, Ohio.

Population, 426,000.

The Cleveland Telephone Company.

#### Rates.

#### Unlimited.

Business—Direct line, \$84 per year.

Residence—Direct line, \$48 per year; two-party line, \$36 per year; four-party line, \$24 per year.

#### Measured Service—Business Only.

Direct line, 300 calls quarterly, \$15.

Two-party line, 225 calls quarterly, \$12.

Direct line, incoming calls only (relief service) \$10.50 quarterly.

(All subject to discount of \$1.50 per quarter if paid during first month of quarter.)

Excess calls, 3 cents each.

Discount, if paid during first month of succeeding quarter, and amounting to:

100 or more per quarter.....	16 $\frac{2}{3}$	per cent
500 or more per quarter.....	33 $\frac{1}{3}$	per cent
1000 or more per quarter.....	50	per cent

\* \* \* \* \*

606

Buffalo, N. Y.

Population, 372,000.

Bell Telephone Company of Buffalo.

*Rates.*

## Business Rates—Direct Line.

No. of messages.	Amount.	Excess rate.	Rate of advance.
1200	\$60	5 cents	4 cents
1300	64	5 cents	4 cents
1400	68	5 cents	4 cents
1500	72	5 cents	4 cents
1600	76	5 cents	4 cents
1700	80	5 cents	4 cents
1800	84	5 cents	4 cents
1900	88	5 cents	4 cents
2000	92	4 cents	3 cents
2100	95	4 cents	3 cents
2200	98	4 cents	3 cents
2300	101	4 cents	3 cents
2400	104	4 cents	3 cents
2500	107	4 cents	3 cents
2600	110	4 cents	3 cents
2700	113	4 cents	3 cents
2800	116	4 cents	3 cents
2900	119	4 cents	3 cents
3000	122	4 cents	3 cents
4000	152	4 cents	3 cents
5000	182	4 cents	3 cents
5800	206	3 cents	2 cents
6000	210	3 cents	2 cents

## Residence Rates—Unlimited.

Direct line, \$48 per year; two-party line, \$36 per year; four-party line, \$30 per year.

## Measured.

Direct line, 800 messages, \$3 per month, excess 4 cents. Two-party line, 600 messages, \$2 per month, excess 4 cents. Four-party line, nickel service, guarantee of 5 cents per day.

\* \* \* \* \*

## Pittsburg, Pa.

Population, 353,000.

Pittsburgh District also includes Allegheny, population 141,000, and also 42 suburbs of Pittsburg and Allegheny, with a total population of about 750,000.

The Central District and Printing Telegraph Company.

*Rates.*

Business—Direct line, \$125 per year; two-party line, \$100 per year.

Residence—Direct line, \$100 per year; two-party line, \$80 per year.

## Measured Service—Business and Residence.

	Direct.	Two-party.	Three-party.	Four-party.	Additional calls.
600 Calls .....	\$55	\$44	\$36	\$32	6 cents
700 Calls .....	60	49	41	37	5 cents
800 Calls .....	64	53	45	41	4 cents
900 Calls .....	67	56	48	44	4 cents
1000 Calls .....	70	59	51	47	4 cents
1100 Calls .....	73	62	54	50	4 cents
1200 Calls .....	76	65	57	53	4 cents
1300 Calls .....	79	68	60	56	4 cents
1400 Calls .....	82	71	63	59	4 cents
1500 Calls .....	85	..	..	..	4 cents
1600 Calls .....	88	..	..	..	4 cents
1700 Calls .....	91	..	..	..	4 cents
1800 Calls .....	94	..	..	..	4 cents
1900 Calls .....	97	..	..	..	4 cents
2000 Calls .....	100	..	..	..	4 cents

## Residence Only.

Four-party line, 500 calls, \$27. Additional calls 5 cents each, or \$4 in blocks of 100, if contractor for in advance.

Four-party-line, \$12 per year maintenance charge, and 5 cents for each local call.

\* \* \* \* \*

## Cincinnati, Ohio.

Population, 342,000.

The Cincinnati and Suburban Bell Telephone Co.

(The Cincinnati District covers about 350 square miles and includes many suburban exchanges. The estimated population of the district is about 600,000.)

*Rates.*

Business—Unlimited—Direct line, \$100 per year.

Measured—Direct line (within two miles of exchange) \$48 per year. Direct line (within four miles of exchange), \$60 per year. (Allowing 600 local outgoing calls per year. Additional calls, 3 cents.)

## Guaranteed Service.

Direct line—Guarantee \$5 per month.

Four-party line—Guarantee 10 cents a day.

(Five cents for each local call. Stations equipped with coin device.)

## Residence—Unlimited.

Stations located within two miles of the exchange—Direct line, \$48 per year; two-party line, \$30 per year.

Stations located within four miles of exchange—Direct line, \$30 per year; two-party line, \$42 per year; four-party line, \$30 per year.

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610

Detroit, Mich.

Population, 220,000.

Michigan Telephone Company.

*Rates.*

Business—Direct line, \$80 per year; two-party line, \$66.66 per year.

Residence—Direct line, \$46.66 per year; two-party line, \$40 per year; four-party line, \$26.66 per year.

## Limited Service.

Twelve hundred outgoing calls per year, with incoming calls free—Business, \$53.33; residence, \$40; excess calls, 3 cents each.

## Guarantee Stations.

Direct line \$60 per year.

Two-party line, \$30 per year.

Nickel in the slot, with all excess receipts divided equally between the company and the subscriber.

\* \* \* \* \*

611

Milwaukee, Wis.

Population, 309,000.

Wisconsin Telephone Company.

*Rates.*

Business—Direct line, \$96 per year; two-party, \$72 per year; direct line (incoming only), \$30 per year.

## Measured Service.

	Calls.	Amount.	Excess.	Maximum for year.
Direct line.....	600	\$48	4 cents	\$100
Direct line.....	1000	60	3 cents	100
Direct line.....	1500	72	2 cents	100
Two-party .....	900	48	3 cents	*80

\*Wall telephone.

## Nickel Service.

Direct line—Guarantee three calls per day; 1½ cents rebate for excess calls.

Two-party line—Guarantee two calls per day; 1 cent rebate for excess calls.

Four-party line—Guarantee 1½ calls per day; no rebate.

Ten-party line—Guarantee 1 call per day; no rebate (wall telephone).

Residence—Direct line, \$42 per year; two-party line, \$36 per year; four-party line, \$30 per year.

## Measured Service.

	Calls.	Amount.	Excess.	Maximum for year.
Direct line.....	800	\$36	2 cents	\$48
Two-party .....	600	30	3 cents	42

## Nickel Service.

Direct line—Guarantee 2 calls per day; 1½ cents rebate for excess calls.

Two-party line—Guarantee 1½ calls per day; 1 cent rebate for excess calls.

Ten-party line—Guarantee 1 call per day; no rebate.

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612 .

Washington, D. C.

Population, 298,000.

Chesapeake and Potomac Telephone Co.

## Rates.

Measured Service, Business and Residence.

## Direct Line—

	Annual rate.	Excess rate.
600 Calls.....	\$39	5 cents
800 Calls.....	48	5 cents
1000 Calls.....	57	5 cents
1200 Calls.....	66	4 cents
1400 Calls.....	72	4 cents
1600 Calls.....	78	4 cents

1800 Calls.....	84	4 cents
2000 Calls.....	90	4 cents
2200 Calls.....	96	4 cents
2400 Calls.....	102	4 cents
2700 Calls.....	108	3 cents
3000 Calls.....	114	3 cents
3300 Calls.....	120	3 cents
3600 Calls.....	126	3 cents
3900 Calls.....	132	3 cents
4200 Calls.....	138	3 cents
4500 Calls.....	144	3 cents

613 Two-party line, 30 messages per month, \$2.50 per month and 5 cents each for excess calls.

#### Residence Only—Unlimited.

Direct line, \$48 per year; two-party, \$36 per year.

\* \* \* \* \*

Minneapolis and St. Paul, Minn.

Minneapolis, Population, 250,000.

St. Paul, Population, 190,000.

Northwestern Telephone Company.

#### Rates.

##### Unlimited Service.

Business—Direct line, \$90 per year; two-party, \$78 per year; four-party, \$54 per year; receiving line, \$30 per year.

Residence—Direct line, \$54 per year; two-party, \$48 per year; four-party, \$36 per year.

##### Measured Service.

Business—Direct line, 800 calls, \$54; two-party, 600 calls, \$42.

Residence—Four-party, 600 calls, \$30.

Excess calls, 3 cents each.

##### Coin Device Service.

Business—Direct line, guarantee, \$48; two-party, guarantee, \$36.

Residence—Ten-party, guarantee, \$18; (no new contracts taken).

All calls 5 cents each.

##### Private Branch Exchange.

Trunk lines, unlimited, \$72 per year.

Trunk lines, measured, \$12 per year.

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348

## THE CITY OF MEMPHIS ET AL., VS.

614

Louisville, Ky.

Population, 220,000.

Cumberland Telephone and Telegraph Company.

*Rates.*

Business—Direct line, \$96; two-party, \$60; four-party, \$48.

Residence—Direct line, \$36; two-party, \$30.

Extension sets, business and residence, \$1.00 per month.

Extra listing, business, 50 cents per quarter.

Extra listing, residence, 25 cents per quarter.

Extra listing, additional user, \$1.00 per month.

## Private Branch Exchange.

Switchboard, \$2.50 per month for each drop.

Stations, \$1.50 per month.

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615

Indianapolis, Ind.

Population, 205,000.

Central Union Telephone Company.

*Rates.*

Business—Direct line, \$54 per year; two-party line, \$42 per year.

Residence—Direct line, \$24 per year; two-party line, \$18 per year.

\* \* \* \* \*

616

Kansas City, Mo.

Population, 176,000.

Missouri and Kansas Telephone Company.

*Rates.*

## Unlimited Service.

Business—Direct line, \$96; two-party, selective, \$72.

Residence—Direct line, \$36; two-party line, selective, \$30; four-party line, semi-selective, \$24.

## Measured Service—Business Only.

Direct line, 960 messages, \$48.

Two-party line, 780 messages, \$39.

Excess messages, 3 cents each.



617

## Coin Device Service.

	Guarantee per month.	Excess.
Direct line .....	\$4.00	3 cents
Two-party line, selective .....	3.25	3 cents
Four-party line, semi-selective .....	2.25	5 cents

A refund of 2 cents per message is made to direct and to two-party subscribers on messages in excess of guaranteed amount.

\* \* \* \* \*

618

## Denver, Colo.

Population, 149,000.

The Colorado Telephone Company.

*Rates.*

## Business—Unlimited.

Direct line, \$120 per year.

(No new contracts for flat service are taken. Old subscribers are continued at above rate.)

## Residence—Unlimited.

Direct line, \$90 per year.

Two-party line, \$66 per year.

## Business—Measured—Guaranteed.

Direct line, \$4 per month (50 calls). Excess 2 cents each.

Two-party line, \$3.50 per month (50 calls). Excess 3 cents.

619 Direct line, 15 cents per day guarantee, each call 5 cents for 3 minutes or a fraction, and 2 cents to be rebated monthly for each call in excess of guarantee. Coin device.

Two-party line, 10 cents per day guarantee, calls 5 cents each for 3 minutes or a fraction. Coin device.

## Residence—Measured—Guaranteed.

Direct line, \$2.50 per month (50 calls). Excess 2 cents each.

Two-party line, \$2 per month (34 calls). Excess 3 cents each.

Individual line, 10 cents a day guarantee, calls 5 cents each, and 2 cents rebated on all calls in excess of guarantee. Coin device.

Two-party line, 7 cents per day guarantee, calls 5 cents each. Coin device.

Ten-party line, 5 cents per day guarantee, calls 5 cents each. Coin device.

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Omaha, Neb.

Population, 117,000.

Nebraska Telephone Company.

*Rates.***Business.**

	No. of telephones.
Direct line, \$84 per year.....	1,537
Two-party line, \$66 per year.....	187
Four-party line, \$54 per year.....	613

620

**Residence.**

Direct line, \$4 per month.....	2,890
Two-party line, \$3.50 per month.....	2,407
Four-party line, \$3 per month.....	1,525

(One dollar per month rebate on residence rates for prompt payment.)

**Limited Service.**

	Direct line.	Two-party.	Four-party.
600 calls .....	\$42	\$36	\$30
700 calls .....	45	39	33
800 calls .....	48	42	36
900 calls .....	51	45	39
1000 calls .....	54	48	42

Excess calls 4 cents each, or \$3 per hundred.

Extension telephone, business, \$1.25 per month.

Extension telephone, residence, \$1 per month.

Extension telephone, residence, wall set, 50 cents per month.

Extra listing, person connected with the firm, \$4 per year.

Extra firm using same telephone, \$18 per year.

Public pay stations, nickel service.

Drug stores, free service.

No compensation on gross receipts. Telephones furnished to the city at 50 per cent discount.

Total number of telephones, 12,358.

Seattle, Wash.

Population, 200,000 (estimated).

Pacific States Telephone and Telegraph Co.

*Rates.*

Business—Direct line, \$72; direct line (100 calls per month), \$60, excess 3 cents; two-party, \$48; four-party, \$36.

Residence—Direct line, \$36; two-party, \$30; four-party, \$18.

Portable sets 50 cents per month additional.

Extension telephone, \$1 per month plus installation charge of \$1.50.

Reduced rates for city service.

No compensation on gross receipts.

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620½ *Report of Walter F. Burgess, on the Foreign Situation.*

621 *Report of Walter F. Burgess on the Foreign Situation.*

### Great Britain.

The history of telephony in Great Britain has been one of constant strife between the Government, the various municipalities, and the private companies. The results of Governmental supervision and interference are well shown in telephone conditions both as regards service and development which exist in Great Britain today.

The Telegraph Acts of 1863, 1868 and 1869 conferred upon the Postmaster General an absolute monopoly of the telegraph lines. Sections 3 and 4 of the Act of 1869 state:

(A) The term "telegraph" shall, in addition to the meaning assigned to it in the Telegraph Act of 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals.

(B) The Postmaster General, by himself, or his deputies, and his or their respective servants or agents, shall, from and after the passing of this Act, have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland, except as hereinafter provided; and shall also within the Kingdom have the exclusive privilege of performing all the incidental series of receiving, collecting or delivering telegrams, except as herein-after provided.

On these two clauses were based actions against telephone companies to test the legality of their right to transmit telephone messages. The case against the United Telephone Company was argued in the Exchequer Division of the Court of Justice and on December 20, 1880, a decision was rendered in favor of the Postmaster General, and since that date the telephone has been regarded as a telegraph within the meaning of the Act.

Following this decision the Postmaster General granted a number of licenses to the United Telephone Company. The licenses were for a period of 31 years, terminating in 1911, and also provided that the Government could purchase the property of the Company at the end of any seven-year period, terminating at 1890, 622 1897, or 1904. Although this was continually threatened it was never done. The license also provided that the Company should pay the Government, as compensation for the right to operate, ten per cent. of its gross receipts.

In 1892 the Postmaster General, who had just been elected, reversed the policy of his predecessor, who had permitted the operation

of toll lines by the private company, and received authorization from Parliament to purchase the toll lines of the National Telephone Company, which he did in 1896 for the sum of \$2,202,400.00. He also agreed with the National Telephone Company that they were to restrict their business within certain specified areas, thus creating a monopoly of the toll line business for the Postmaster General.

In 1899 another Act was passed permitting the Postmaster General to license municipalities which were desirous of owning and operating their own telephone systems, and also permitted the Postmaster General to establish a London exchange system which was to operate in opposition to the National Telephone Company.

This act required the municipalities to use the toll lines of the Postmaster General, and regulated the relation of private companies and municipalities in the event of competition. It prevented the Company from discriminating or showing preference in the event of competition in its area, and limited the charges within the maximum and minimum rates authorized by the Postmaster General in that locality.

It also compelled the National Telephone Company to grant inter-communication within the competitive area upon the request of the municipality, and prohibited the establishment of any new exchanges by the National Telephone Company; thus, at last, giving the Postmaster General an absolute control of the telephone situation throughout the United Kingdom.

Following the Act of 1899, there was considerable activity amongst the various municipalities and a considerable number of telephone licenses were issued. However, only six were proceeded with, these being the municipalities of Tunbridge Wells, Glasgow, Brighton, Portsmouth, Swansea and Hull.

On November 8, 1901, the Postmaster General reversed his former policy of establishing a competitive telephone system and made an agreement with the National Telephone Company to purchase its property in the London area. The agreement makes provision for the purchase of the property upon what are known as "tramway turns;" this means its value at the time of purchase, allowing nothing for goodwill, past or future profits. The agreement provides for inter-communication between the exchanges of the Post Office and the National Telephone Company, contains a schedule of rates

to be charged by both systems, and states that the trunks for  
623 connecting the exchanges of the two systems shall be provided by the Postmaster General who will convey the wires of the Post Office to the wall of the building in which the exchange of the National Telephone Company is situated.

On February 2, 1905, the Postmaster General made another agreement with the National Telephone Company for the purchase of all its property throughout the United Kingdom at the expiration of its license on December 31, 1911. The terms of purchase were the same as those contained in the agreement of 1901, the only exception being that good-will was to be paid for the private wire business of the Company which existed without the sanction of the Postmaster General. The general terms of the agreement were ap-

proved by Parliament, but an amendment was made, making it obligatory for the Postmaster General to take over the employes of the National Telephone Company upon the acquisition of its property.

The foregoing brief history has been given for the purpose of showing the effect of such policies upon the present existing conditions of the telephone industry of Great Britain.

The total development, as of March 31, 1905, may be summarized as follows:

	Stations.
National Telephone Co. ....	326,017
Post Office, London .....	24,351
Post Office, Provincial .....	8,644
Municipalities .....	18,633
Guernsey .....	1,500
<b>Total</b> .....	<b>379,145</b>

The Municipalities had the following number of telephones as of the same year:

Glasgow .....	12,262
Brighton .....	1,921
Portsmouth .....	2,250
Swansea .....	1,259
Hull .....	1,570
<b>Total</b> .....	<b>19,262</b>

The National Telephone Company had 40,793 stations in the five competitive areas as of the same date, and had added 10,503 stations during that year while the Municipalities had added only 2,149 stations during the same period.

The statement has been made by persons having more regard for picturesqueness of language than for the accuracy of their figures, that Great Britain is the worst supplied country in the world in the telephonic sense. As a matter of fact, it ranks next to America, and has more subscribers, and handles more calls than the countries of Austria, Belgium, Denmark, Holland, Italy, Norway, Spain, Portugal, Russia and Switzerland together.

The development of the telephone service in Great Britain, and London in particular, is unquestionably far from what it should be. There is no doubt whatever that legislation and governmental and municipal interference has caused this condition of affairs not only in Great Britain but in all Europe. This is more apparent, however, in Great Britain than in the Continental countries, for the reason that the British people are more apt to develop technical and mechanical industries quicker than the people of Continental countries. In support of this I would point out that the British nation was the pioneer in telegraphy, sub-marine cable laying, railway work, and ship building. The history of the National Telephone Company will also support the above assertion in a most conclusive manner.

Prior to 1892, the National Telephone Company had no statutory rights upon the high roads, and subsequent to 1892 this right existed in London only by the consent of the County Council or subject to the consent of the various local authorities. This fact has placed the Company at the mercy of every local authority. Only those acquainted with the red tape of the average municipal authorities in Great Britain can have any idea of the paralyzing effect on the development this fact has had. The application of the Company to install underground systems has been persistently refused by the Municipal authorities. The application to the London County Council for permission to install an underground conduit system within the city of London was refused, although the Post Office Department was given every facility. This action compelled the Company to increase its overhead system and this added some thousands of dollars to its annual maintenance charges. The difficulties of obtaining wayleaves are sometimes enormous and occasion great delays in connecting up subscribers. It is within my own personal knowledge that nine months has elapsed prior to the application for a telephone and the actual installing of the instrument, due to this inability of obtaining wayleaves. The total amount paid for wayleaves in the city of London for the year ending 1903 was \$168,150.00.

The ten per cent. (10%) of the Company's gross earnings, which are payable as royalty charges, can only be considered as a direct tax upon the subscriber. The amount under this heading collected from the Company up to March, 1904, was \$8,000,000.00, and the balance sheet for 1906 shows that the annual charges under this heading amount to over \$1,000,000.00 per annum. It must  
625 be borne in mind that although the Post Office receives this large amount, it does not render any service whatever in return.

The limited tenure of the license has also had a great effect upon the development for the reason that it has almost been impossible to induce financiers to advance money in a business which was subject to a limited and a steadily decreasing life.

Frequent changes in the Governmental policy due to changes in administration has also hampered the Company to a great extent. This is instanced in the case of the change in Governmental policy both as regards the toll lines and the intention to adopt the competitive system.

The statement has been made that the conservative nature of English commercial methods has been a prime factor in the low development. This is undoubtedly true to an extent, but I believe that this conservatism could be broken down provided that an efficient service was given. The London telephonic area is the largest single area that I know of. It embraces 640 square miles and had a population at the commencement of this year of 6,000,000. The National Telephone Company had at the commencement of this year, 91,619 stations attached to 58 exchanges. The Post Office had 38,482 stations attached to 11 exchanges, giving a total of 69 exchanges and 130,101 stations. This gives a total development for the area of one telephone for every 46 inhabitants.

The service given by both companies, in my opinion, is both poor and slow. The reason for this is, I believe, due to the lack of standardization of apparatus and central control. The switchboards are of various types and manufacture, some being magneto of various ages and kinds, and some common battery. The trunk lines are quite insufficient to carry the load and during the busy hour are terribly congested. Many of the Post Office exchanges are not directly connected with some of the National Telephone Company's exchanges. A subscriber calling to one of these exchanges is often compelled to go through one or two exchanges which have different types of equipment. This is productive of great delays and causes poor service. I have frequently been hours in trying to secure connection from one side of London to the other. Another reason, in my opinion, for the poor service given, is due to the fact that the wages paid the operators are not sufficient to attract the most intelligent class of girls. In the case of the operators of the Post Office Department, they are protected by the civil service rules and cannot be discharged except for cause. They are of various ages and it is impossible to enforce proper discipline. The wages paid and the hours of labor are as follows: (See Appendix).

The Post Office Department state that it is its intention to organize the telephone system in the London area along approved  
626 American lines. All of the switchboards of the National Telephone Company that need renewing are being replaced by common battery switchboards. It will undoubtedly need an expenditure of some million of dollars to properly equip such a large area.

The rates charged in the London area by both systems are as follows: (See Appendix).

It should be understood that the giving of a choice of either the flat or the message rate was of somewhat an experimental nature. At the outset it was proposed to adopt an exclusive flat rate schedule, but the officials who had inspected the telephone systems in America had reported so strongly in favor of an exclusive message rate schedule that it was decided to embrace the two methods and await developments. Within the first year of the opening of the Post Office system it became apparent that the message rate system of charging for telephone service was not only the most equitable system for both subscriber and company, but was absolutely the only system which would permit of an efficient service being given. Ninety per cent. of the Post Office subscribers are on the measured rate schedule and the average calling rate per day is only 3.7 per line. On the National Telephone Company's system there are only 34 per cent. of the subscribers who are on a measured rate schedule and the average calls per day are 9.6 per line. This gives an excellent example of the advantages of a measured rate system of charges in regulating traffic and service.

In this connection I would say, that the evidence given by both the officials of the Post Office Department and the National Telephone Company at the various parliamentary inquiries concerning telephone conditions, was entirely in favor of the message rate.



They have been unanimous in stating that this is the only logical and equitable rate for a large exchange system, both as regards the subscriber and also as a means of obtaining the highest efficiency in the exchange.

Mr. Gill, the chief engineer of the National Telephone Company, speaking on this question before a commission, said: "The study of traffic has demonstrated quite clearly that the ordinary method of charging for telephone service by means of a flat rate—that is, when for a fixed sum an unlimited number of calls may be originated—is hopelessly wrong." This opinion is endorsed by all of the telephone engineers in the large cities of Europe.

The advantages from a financial standpoint to the subscribers of a measured rate system is clearly demonstrated by an extract from the balance sheet of the National Telephone Company for the year ending March 31, 1906. The President stated that the average income per station whilst operating on an entire flat rate basis was \$34.50. With 34 per cent. of its subscribers on a message rate schedule the average income per station had dropped to \$31.00 per station.

The advantages of a message rate schedule in eliminating excessive busy signals is clearly demonstrated by a test which was taken in London and is shown on the accompanying chart. It was announced in the daily press of last November that no further flat rate contracts would be made and so, with the expiration of the flat rate contracts already issued, the telephone system of London will be operated on an entire message rate schedule.

Objections have been raised by the message rate subscribers to the method of registering the calls. This objection has been a serious one and has been discussed not only in the technical paper but by the general press. The registers are designed on similar principles to a cyclometer and are fixed on a special rack in the exchange from which they are cabled to the message rate subscriber's answering jack. As soon as a call is completed and the clearing signal has been given, before taking down the connection the operator presses a key which energizes an electro magnet which attracts a ratchet, causing a train of wheels to revolve. I installed the first registers that were introduced into England and made a number of exhaustive tests in regard to their reliability. The register itself is as perfect as human ingenuity can make it, but the accuracy of the record depends entirely upon the operator, and owing to this human element there is a possibility of mistakes being made. Seeing that the register will operate with each action of the key and as the register records afford the only indication of the work done by the operator and is taken into consideration with a view of equalizing the calls they handle, it is at least permissible to think that an unscrupulous operator might find it advantageous to record an excessive number of calls with a view of securing lighter work or acting in collusion with the subscriber might willfully neglect to register the call.

The suggestion has been made by non-technical contributors to the press that the register should be fixed on the subscriber's instrument. A little thought will show that the register would count

every time the telephone was handled and would give results that would be useless as a basis of charging, since under a message rate schedule the only acceptable unit of charge is the outward effective call. In my opinion the only method to pursue would be to devise a circuit which would lock the mechanism after a call has been registered and which would release only on disconnection of the answering cord.

The balance sheets of the Post Office Department for the year ending March 31, 1903, are very interesting. They show that 628 the cost of constructing 8,528 stations averaged \$171.32 per station. This amount is \$23.64 more per station than the average of the National Telephone Company.

The most extraordinary statement is, however, found under the heading of expenditure. The statement is "Balance available towards meeting depreciation, interest, etc., \$715,430.00." Underneath in brackets are the words, "Read notes." The notes referred to are as follows:

"(1) The estimated amount required to provide for depreciation of plant, exclusive of spare wires, is \$335,270.00, and interest at 3 per cent. on the capital expenditure of \$9,404,400.00 is \$331,920.00, making all together \$667,190.00.

(2) Terminal annuities have been created payable from the appropriation to provide for the repayment, with interest at 3 per cent., of capital raised for telephone purposes under the Telegraph Acts of 1899-1904. The annuities provide for the re-payment of the capital in twelve to fifteen years, while the estimated life of the plant averages 33 years. The annuity required for interest and sinking fund on a capital expenditure of \$9,404,400.00 repayable in 30 years with interest at 3 per cent. would be \$564,484.00. No deduction has been made from the annuity on account of the value of material recovered when plant is renewed."

From reading Note (1) anyone who agreed to accept 3 per cent. as a proper sum to set aside for depreciation, would imagine that a small profit of \$48,240.00 had been made on the year's working. It is my opinion that 3 per cent. is not a sufficient sum to set aside for depreciation, and I do not hesitate to say that had a proper sum been set aside the year's working would show a big loss. It is, to my mind, almost inconceivable that any telephone engineer of any experience will seriously state that the estimated life of the plant averages 33 years, and the final remark that no deduction has been made from the annuity on account of the value of material recovered when plant is renewed can only be characterized as a piece of unconscious humor.

In the report of the Merchants' Association of New York the case is cited of a company in Baltimore where the entire original plant after being in service but five years was disposed of as junk and \$2,155,000.00 was spent in its replacement. The report also states that during the 16 years which its investigation of the New York telephone system covered, the plant had been practically rebuilt three times. The statement of the Post Office, irrespective of a proper allowance for depreciation, shows a loss for the year ending

March 31, 1906, of \$184,324.00. On referring to its balance sheets for the same year for the provincial and toll line systems, I find similar inadequate amounts set aside for depreciation despite the fact that all the provincial systems and toll lines are aerial.

In spite of this the loss on the provincial system is \$149.629 577.00 and on the toll line system \$105,535.00, giving a total loss for the year ending March 31, 1906, of \$439,433.00. In the face of this the prospect for the future from the taxpayer's standpoint cannot be said to be very cheerful.

### Toll Lines and Rates.

The rates for toll service are as follows:

Six cents for each 25 miles or fraction thereof up to 100 miles.

Twelve cents additional for each 40 miles or fraction thereof over 100 miles.

The rates for night messages (7 P. M. to 7 A. M.) are one-half the day rates for a 3-minute period, except when the charge is 6c., 12c. or 18c., in which case a 6-minute period is allowed at the regular day rate.

The period of conversation is 3 minutes from the time when the subscriber is notified that connection is made. The subscriber may, by the payment of a double fee, obtain uninterrupted service for 6 minutes, but a trunk line cannot be used for more than 6 minutes, and a subscriber must surrender the line at the end of the 6 minute period and again await his turn.

In considering the rates for toll line service, it should be understood that the charge commences immediately when the connection is put up. This is termed the "double number method" and is distinctive from the personal party message. Appointment calls cannot be made, neither can a subscriber ascertain if the person desired is in, but has to pay for the connection in all cases.

No refunds are given in case the circuit has been faulty and has not permitted a satisfactory conversation.

The service given by the trunk line system is good as to transmission for the reason that very heavy wire is used, and the constructional cost is very heavy as only two or four circuits are placed on a pole.

The cost of maintenance is also high on account of the severe wind-storms that prevail in some portions of Great Britain.

The chief faults of the system are the insufficiency of circuits which causes long delays. The practice of allowing the subscriber the use of a trunk line for three or six minute periods is unsatisfactory for the reason that if a subscriber is unable to transact his business within the six minute period he is obliged to await his turn to get the trunk line again, which often runs into hours when the traffic is heavy. The necessity of providing a plant which will accommodate the service at its peak is apparently unappreciated. Most of the calls are in the nature of short hauls. The longest distance over which commercial speech is transmitted, is from London to Marseilles, a distance of 800 miles. A Post Office subscriber desiring

630 long distance service with another Post Office subscriber, apart from the above objectionable features, does get a good service, but if the subscriber is connected with the National Telephone Company's exchange, the difficulties are greatly increased owing to the fact that it is necessary to work through two systems often having different types of apparatus. The delay in getting the subscriber is greatly increased and when the connection is actually put up sometimes it is impossible to carry on a conversation due to the interference of the operating forces. This is entirely due to a lack of central control which is impossible under existing conditions. It is not an infrequent circumstance for the subscriber to be cut off while in the midst of conversation and the circuit once lost cannot be regained at once. Payment must be made, however, and one's turn awaited.

Complaints made to the Post Office have to go through the usual red tape routine and when a reply is received the whole of the blame is attributed to the National Telephone Company.

Any complaints made to the National Telephone Company are almost certain to be attributed to the vagaries of the Post Office. In this dilemma the Englishman uses his prerogative which is to grumble and pay. As the Postmaster General has no control of the operating forces of the National Telephone Company and *vice versa*, this unsatisfactory state of affairs will continue until the two systems are merged into one. The attempt of the Postmaster General to define what satisfactory inter-communication between the municipal exchanges and the National Telephone Company's exchanges, for the purposes of receiving toll messages, would consist of, was a failure. Neither the engineers of the Municipalities or the National Telephone Company would agree as to what adequate inter-communicating facilities consisted of, and in the case of Swansea went to law at the expense of some thousands of dollars to the rate payers to try and settle the question.

The toll service between Great Britain and the Continent is not a commercial success. The Postmaster General in reply to a resolution passed by the Association of Chambers of Commerce of the United Kingdom, expressing the opinion that the exigencies of trade required the utmost telephone facilities between the great mercantile cities of Great Britain and the principal commercial cities of Europe, and urging him to establish as soon as possible direct and more efficient communication, stated that he feared that the difficulties in connection with long distance telephony was not fully understood. He said that many of the complaints already investigated were due to the fact that an unsuitable form of telephone was at one end or the other of the line. This condition of affairs will always continue when standardization of apparatus does not exist. In my  
631 opinion, to give a first class long distance service it is necessary to have not only a complete standardization of materials but of operating methods as well.

## Municipal Telephony in Great Britain.

The Act of Parliament of 1899, permitting municipalities to borrow money for the purpose of establishing Municipal telephone systems, was taken advantage of by the towns of Glasgow, Hull, Portsmouth, Brighton and Swansea and Tunbridge Wells. At the present time only two of these systems are still being operated by the Municipalities, and both of these have made overtures to the Postmaster General for the disposal of their telephone business. Nothing has, however, been decided as the offer of the Postmaster General for the property would involve the rate payers in a loss of between fifty and sixty thousand dollars. The history of all these systems is one of hopeless failure and it will probably suffice to give one example of the business and engineering methods employed. Taking the city of Glasgow, which has a reputation as an M. O. town, its license was obtained in March, 1900, and was valid for a period of thirteen years. The National Telephone Company was at this time operating there with a system composed of overhead lines and grounded circuits. Realizing that its system was out of date, it applied in 1896 for permission to install complete underground metallic circuits and thus modernize its system. The corporation refused the application and the Company was obliged to contract with individuals for its wayleaves. In some cases the rental charge for the use of a roof is nominal, in other cases the company is not only required to pay a large rental but to keep the roof of the building in repair. The only underground facilities which the company had were obtained by means of contracts with the different railroads having tunnels in the city. For these facilities the Company was obliged to pay an annual rental of \$1.20 per mile of wire, and in the case of one railroad company a minimum guarantee of \$4,800.00 per annum was required. The following schedule of rates was charged: (See Appendix).

This was the state of affairs of the Company the Municipality proposed to enter into competition with. The position in Glasgow in 1900 was something in this nature. The district to be served by the proposed telephone system covered an area of 140 square miles, and included numerous small towns and suburban districts having a total population of about one million. Free use of the streets could be obtained together with the local influence a large Municipality can always command. Its only competitor was handicapped by  
632 having neither of these advantages and having to operate with an obsolete system. It would be imagined that with these enormous advantages the Municipality would have laid down a modern common battery plant based on the broadest possible lines so as to care for all future development. Unfortunately, the engineer who was engaged to advise on this undertaking was not apparently familiar with common battery systems and proposed to install a system which was absolutely experimental in its nature and which had never been tried out anywhere. He succeeded in persuading the Council that his proposed system was an efficient one and could be constructed at a less initial outlay than any common battery system. He submitted estimates showing that the average cost of construction would be \$86.00

per station and that an annual flat rate of \$24.00 would be sufficient to pay operating expenses, interest, depreciation and provide for sinking fund and all the other proper charges incident to the conduct and operation of a telephone system in that Municipality. It began operating in 1901, the undertaking being financed by selling corporation stock which was secured by the taxes of the city. Almost immediately the faults in the system which had been predicted, became apparent, and changes in the plant became necessary. Something appeared to have gone wrong with the plans of the main exchange and it became necessary to open another exchange near by. Alterations on a more or less increasing scale became necessary until there were four or five different methods of working the telephone. For instance, at one station a card warns you to ring before you take the receiver off the hook, in another you must take the receiver off before you ring, in still another you must push the red button, and so it went on. The natural result was that the growth of subscribers which was at first rapid owing to the cheap rates and the glowing promises of an efficient service almost ceased. Obsolete methods were also followed by this engineer in installing his underground cables. Of the 225 miles installed, one-quarter consists of armored cable laid in the ground without any protection. The balance sheets prepared for the telephone department show a total capital expenditure as of May 1st, 1905, of \$1,683,475, or an average gross cost of \$136.00 per station, as against the estimated cost of \$86.00 per station. The total revenue was \$266,044.00. The total expenditure was \$258,825.00. This gives a total revenue per station of \$21.52 as against a total expenditure per station of \$20.93, leaving a balance which may be charged to depreciation at the end of the fiscal year of a total of 59 cents per station. In connection with this last item the auditors make this statement which, however, does not appear in the telephone report but in the general proceedings of the Council:

"The accounts of the Telephone Department for the year ending May 31, 1905, exhibit the true position of the Telephone Department, but the sum provided out of revenue for depreciation is insufficient." Another instance taken from the balance sheet will be very instructive. This is the fact, that the Municipalities canvassed extensively for subscribers but did not charge the expense of canvassing to the Telephone Department at all, the expenses being paid out of the general City Budget. It was evident that such business proceedings could only have one termination and after an expenditure of some \$1,800,000.00 in building up the system, it became necessary to expend another \$500,000.00 on alterations and small extensions to meet the circumstances of the day. Already working at a loss and with no probability of profit from the increased capital outlay, the telephone department was face to face with either being wound up upon the best terms obtainable, or continued after additional capital expenditure at an ever increasing loss to the rate payers. Under these circumstances it was wisely decided to sell out the whole concern and have done with it. So the plant was sold on July 6, 1906 at a loss of \$200,000.00.



Opponents of Municipal enterprises have taken the Glasgow fiasco as a reason for objecting to Municipal enterprises of any nature. The telephone system failed not because it was Municipally owned, but because it was based on unsound engineering principles which would have caused its failure wherever it was tried. The lesson is teaches to my mind, is the absolute absurdity of selecting a large city in which to try out anything of an experimental nature, especially in such an enterprise upon the success or failure of which the commercial prosperity of the city depends.

I do not wish it to be understood that I have insuperable objections to anything but a common battery plant. I do say that it is in my opinion, the most efficient system today but what will be the case in ten or even five years' time, I do not pretend to say. It has been my experience that every mechanical device that has been of any practical use has gone through a gradual development. It requires time to ascertain whether it is of any value and it requires time and experience to perfect it. It can only be said that by installing an experimental system the citizens of Glasgow were invited to take chances. If it became necessary to modify the form of the installation or improve it, they had to furnish the money or sacrifice the investment already made.

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*Paris.*

The City of Paris had for year ending 1904 a population of 2,636,000 and a total of 49,444 telephones of all classes, giving the extremely small development of 1.8 telephones per each hundred inhabitants. The history of the French Telephone System commenced with the year 1879 when the French Government granted 3 five-year concessions to different companies to install telephone systems in Paris. The first exchange was opened on Sept. 30th, 1879, and charged a flat rate of \$115.80 per station per annum. In 1880 the three companies combined and formed the General Telephone Company. This company in 1884 received the 5-year franchise covering the entire city. Under the terms of the franchise the state reserved the right to regulate the charges made by the telephone company and to purchase the system at its physical value at the termination of the concession. The telephone company was compelled to pay to the state 10% of its gross receipts. All the employes were required to be of French nationality and take the oath of secrecy taken by all employes of the Post Office Department. There was a deal of friction between the Government and the Company regarding the terms of the acquisition of its property by the Government. This friction resulted in the Government early in September, 1889, taking summary possession of the Company's Paris exchanges, it being claimed that the Company had violated the terms of its concession. Prolonged litigation resulted and was continued until 1897, when the department paid the Telephone Company \$1,222,527 for its exchanges as against the claims amounting to between two and three times that amount which was presented by the Company. The Tele-



phone System of Paris since that date has been operated by the State as a branch of the Post Office Department. It stands today both as regards its Local and Long Distance service as the most utterly inefficient and obsolete system in the whole of Europe, so notorious is this fact, that it is held up as a laughing stock by European engineers and is a daily exasperation to the subscribers. This fact is not due to one or two circumstances but to a multiplicity of causes. From my observation the principal causes of the failure of the system was lack of discipline among the operators and their consequent inefficiency, the elementary knowledge of the engineers of all telephone problems and the astounding fact that a subscriber has the right to choose his own apparatus. In connection with this last feature there was according to a statement issued Dec. 1, 1901, by the Department of Post and Telegraph, one hundred different types of telephones from which a selection might be made. When to this fact is added the statement that the switchboards at the various exchanges were also of varying types and badly maintained, it is quite obvious why the telephone system of Paris is such a miserable travesty. The salary of the operators is made up as follows:

	Per annum.
Salary .....	\$212.30
Living allowance .....	57.90
Meal allowance .....	57.90
<b>Total.....</b>	<b>\$328.10</b>

The salary is increased from time to time to a maximum of \$289.50 per annum, the living and meal allowances remaining the same as at entrance. All operators must be at least 18 years and not over 25 years of age at entrance and of French nationality. They are obliged to have certificates of physical ability, health and moral character, and must pass an examination on general subjects before qualifying. A pension fund is provided by deducting one-twelfth of the yearly salary, and after 30 years' service an operator is entitled to receive \$146.58 per annum. And after 40 years of service the amount of pension is \$200.00 per annum. The reason for the poor discipline amongst them is due to the fact that they are protected by the French Civil Service laws and cannot be removed except for cause, and this rule is difficult and seldom enforced. Operators of all ages, both married and unmarried, are seen at the switchboard. They do as they please, even to the extent of reading whilst on duty, talk as they please, and answer calls when they please. There is no school for the training of operators and no retiring or lunch rooms are provided for them. The switchboards and the apparatus are apparently never cleaned, and the conditions in the operating rooms are so unhealthy that at times 25% of the operating force is sick. An operator may not marry without the consent of the Department, and they are not permitted to marry a man who is connected with the Police Department. The engineers of the Telephone Department have no special telephone training and appear to have no knowledge whatever

of the requirements of a comprehensive telephone system. They are not respected by the employes of the Department over whom they have no control. They are underpaid. The salaries paid to the Director, Engineers and Clerks of the Department are as follows:

	Per annum	
Directors . . . . .	\$2,316.00	to \$2,895.00
Chief Engineers . . . . .	1,544.00	to 2,316.00
Assistant Engineers . . . . .	482.00	to 656.00
Clerks . . . . .	289.00	to 482.00

637 They conform to the rules of the Department in a most minute particular, their one aim in life apparently being to hang on until they are able to obtain better positions, as the better the position the better the pension, when the age limit arrives. The subscribers have gone to the greatest lengths to try to improve the telephone service. In July, 1904, they formed an association for this purpose. They have the support of the daily press and publish a monthly periodical criticising the service, making suggestions and giving statistics and statements concerning American conditions. The President of the Association criticised the Department and the service in a letter addressed to the Department from which I quote the following extracts:

"The Department does not consider subscribers as customers but as tax payers who are liable to taxation and compulsory labor at the discretion of the Department."

The subscriber is obliged to exhaust himself by shouting and is then often unable to make himself heard. Incorrect numbers are frequently called giving the wrong subscribers, and if a subscriber is cut off from the person with whom he is conversing it is impossible to regain that person. The engineers do not appear to have been properly trained for the telephone service, have no technical ability, and are ignorant of the rules governing the commercial conduct of the industry. As there is no school for the training of operators they acquire their experience at the expense of the subscribers. The switchboards are out of date, faulty and imperfect. Subscribers making any complaints are subject to discourteous treatment. So influential were members of this association, and so persistent their efforts that the Under Secretary of State for Post and Telegraph, whose administration had been so ruthlessly criticised, was removed, and a commission was appointed by the Government to investigate the Parisian service, and the French telephone service in general.

They reported recommending that the present telephone instruments should be altered so that common-battery signaling might be used. The association of subscribers protested against this as not being in accordance with modern standard practice, and Mr. Simyam, the present Under Secretary, in a communication of last December states that the present proposal is to reconstruct the Paris exchanges and to adopt the common battery system. Anyone familiar with the deplorable state of disorganization of the Paris Telephone System, both as regards staff and equipment, will realize he has difficult work before him. A further instance of the unsound busi-

ness principles on which the system is conducted may be shown in a report which the operators of the Paris telephone exchange  
 638 presented to the Under Secretary in November, 1905, embodying from the standpoint of the operators, the reasons for the poor service in Paris. The report states that two principal reasons for the poor service are, (1) the imperfection of the apparatus, (2) the numerical inefficiency of the personnel, and it further states that the Government is in error for giving the Telephone Department a fiscal character, instead of organizing it into a commercial and industrial enterprise, which is the only way to develop it in a methodical manner. The Engineers of the Department are criticised as having no experience in operating a telephone system, and being absolutely ignorant of the progress in telephony. The apparatus is criticised as being poorly maintained and out of date, and the new apparatus, which was designed by the Engineer of the Department, is poorer than the old type. The report concluded by stating that if American practices had been followed the service would not have been as poor as it is. Whatever may be thought of the advisability of permitting subordinates to criticise their superior officers, it must be admitted they possess a correct knowledge of what the situation requires. The Long Distance lines are numerically inefficient and subscribers are subjected to tedious and irritating delays. The service is, however, very poor as regards transmission. The international long distance is slow and unreliable. Intending subscribers have to secure the consent of the owners of the property to have a telephone installed upon the premises, and in case of a death of a subscriber his heirs are bound by the contract.

The finances of the French Telephone System are conducted without any regard to the ordinary rules pertaining to a commercial business. There is apparently no provision made for a capital account or its repayment, as the Government claims that it is its own security, and that it is unnecessary to set aside an annual sum from the receipts of the Department for the repayment of moneys which are advanced it from time to time by the Government. The Department does not set aside any sum for the depreciation of the plant. The receipts and expenses of the Telephone Department are combined with receipts and expenses of the Telegraph and Post Office Department, and it is impossible to say from the statements made by the Department what are the financial results of the operation of the telephone system. I append the statement of 1903. The Government has the right under the law of 1885 to construct and maintain telegraph and telephone lines under or over public highways, and to install telegraph or telephone lines in the sewers of a municipality without the consent of the municipal council, but provides that the  
 639 municipal council may demand compensation for the use of the sewers by the Post Office Department. The Department has the right to install conduits or poles under or over private property, provided the property is not enclosed or has not a building upon it, and they have a right to attach fixtures to buildings.

*Paris Statistics.*

## Schedule of Rates.

	Principal.	Supple- mentary.
1. Local Flat Rate:		
Paris .....	\$77.20	\$9.65
Lyons .....	7.90	7.72
Cities with more than 25,000 inhabitants.....	33.60	7.72
Cities with less than 25,000 inhabitants.....	28.95	7.72
2. Group Flat Rate:		
Paris .....	77.20	9.65
Other cities (according to population of group).		
3. Interurban Flat Rate:		
Paris .....	28.95	9.65
Lyons .....	24.12	7.72
Other cities .....	9.65	7.72
4. Season Flat Rate:		
Annual charge—		
Paris .....	19.30	2.41
Lyons .....	14.47	1.93
Other cities .....	9.65	1.93
Monthly charge—		
Paris .....	7.72	.96
Lyons .....	5.79	.77
Other cities .....	3.85	.77
Quarterly charge—		
Paris .....	19.30	2.41
Lyons .....	14.47	1.93
Other cities .....	9.65	1.93
Measured Rates:		
First year .....	19.30	5.79
Second year .....	13.44	5.79
Third year .....	11.50	5.79
Thereafter .....	7.72	5.79

The rate per message being as follows:

Two cents for each local conversation of 3 minutes.

Five cents for each exceeding 15 5/10 miles in length of conversation between districts in the same canton.

Eight cents for each conversation of 3 minutes between districts of the same department where the lines are not over 15 5/10 miles in length.

Five cents for each conversation of 3 minutes for each 43 6/10 miles or fraction thereof, from the main stations of one department to the main station of another, which may not be less than 8c or exceed 60c a conversation.

640 The Governmental and Municipal Departments Pay the Following Reduced Rates for a Local Flat Rate Subscription:

	Principal station.
Government Departments:	
Paris .....	\$38.60
Lyons .....	26.95
Cities with more than 25,000 inhabitants.....	19.30
Cities with less than 25,000 inhabitants.....	6.65
Municipal Departments:	
Paris .....	57.90
Lyons .....	43.43
Cities with more than 25,000 inhabitants.....	28.95
Cities with less than 25,000 inhabitants.....	23.65

### *Regulations and Rates.*

The Telephone Department has a system of flat and measured rates.

Subscribers residing in cities which have more than 80,000 inhabitants are permitted to use only the flat rate, while subscribers who reside in cities having a population of less than 80,000 inhabitants may choose either the flat rate or the measured rate. There are four kinds of flat rate subscriptions.

1. Local flat rate subscriptions.
2. Group flat rate subscriptions.
3. Interurban flat rate subscriptions.
4. Season flat rate subscriptions.

The subscriber who uses the local flat rate subscription may communicate with the subscribers in his own exchange system, and with subscribers in the other exchange systems who are allowed to communicate with his own exchange upon payment of the regular fees. He can also use the public stations within his exchange area without extra charge upon presentation of a pass which is issued by the Post Office Department. Subscribers for the "Group Flat Rate" are those who reside in a community where there is an exchange which is in a group of municipalities within a radius of 15.5 miles from common center, and which are connected with each other.

Subscribers for this class of service may communicate with the subscribers of any exchange located within the prescribed area without extra charge. They may also communicate with the subscribers of other exchange systems upon payment of the regular toll fees, and use public stations in their own exchange area upon presentation of the pass of the Department. Interurban flat rate subscribers are only permitted in cities of more than 80,000 inhabitants. They have the

right to communicate with other cities upon the payment of the regular interurban fees, but not with the subscribers of their own exchange. Season flat rate subscribers are only allowed in cities which contain more than 80,000 inhabitants, and the rights of a subscriber for this class of service are practically the same as the local flat rate subscriber. The principal differences being that the subscriber makes a payment in advance for the time which he states that he wishes to have a telephone, and is not allowed the free use of public stations.

The measured rate, as already stated, prevails in cities of less than 80,000 inhabitants, and the measured rate subscriber has the same right as the local flat rate subscriber, except that he must pay for all calls at the regular rate and receives no pass for the free use of public stations.

Telephone Stations are defined as:

(1) The principal station, which is a station attached directly to an exchange.

(2) The supplementary station, which is a station attached to a principal station.

Supplementary stations have the same number as the principal stations with which they are connected and can only be reached through the principal stations. A subscriber to have a supplementary station must be a subscriber to a principal station, and if the supplementary station is in the same building as the principal station anyone in the building may use it, but if it is in a different building, only the subscriber to the principal station may use it.

All subscribers are obliged to purchase their own telephones. Flat rate subscribers, except in Paris and Lyons, are obliged to contribute to the cost of the installation of the whole of their principal station line, while measured rate subscribers only contribute to the cost of the installation of that portion of the line outside the "free maintenance" limit of the Department. In Paris the subscribers have to pay the cost of the installation of that portion of their line which is outside the fortifications, and in other cities where only the flat rate is allowed, the "free maintenance" limit is arbitrarily fixed by the Under Secretary of State in each case. The limit in cities using both the flat and measured rate is a radius of three-fifths of a mile from the central exchange of the city. The portion of the line which is within the three-fifths of a mile radius is maintained by the State for the subscriber, but outside of that limit the line must be constructed and maintained by the subscriber.

The Installation Charges are as follows:

Aerial lines, 0.88 per meter (39.37 inches) single wire.

Metallic circuit, 1.17 per meter (39.37 inches) double wire.

Changing from grounded to metallic circuit, .58 per meter (39.37 inches) single wire.

Underground lines, grounded circuit, 2.66 per meter (39.37 inches) single wire.

642 Metallic circuit, 3.51 per meter (39.37 inches) single wire.

Changing from grounded to metallic circuit, 1.75 per meter (39.37 inches) single wire.

The costs of maintenance outside of the free maintenance limit are as follows:

Aerial lines, 0.08 per meter (39.37 inches) single wire.

Metallic circuit, .01 per meter (39.37 inches) single wire.

Underground lines grounded circuit, 1.8c per meter (39.37 inches) single wire.

Metallic circuit, 2.3c per meter (39.37 inches) single wire.

Subscribers must furnish supplementary stations at their own expense, and must also pay the Department the actual cost of the installation with ten per cent. added.

The interior wiring of supplementary stations is done by the Department, and the exterior wiring must be done at the expense of the subscriber, but if the station is in another building the subscriber must pay the Department a rental of 11.8 cents per month for each 1,000 feet of line.

A flat rate subscriber who has had a principal station for one year may have his station removed free of charge, but supplementary stations are moved at the subscriber's expense, who must also make a new contract for one year. Exchanges which are closed part of the night may be called upon payment of an extra fee. In Paris the flat rate for this service is 5 francs (\$1.00) per month.

The pay station rate for local calls in Paris is 3 cents for a conversation of three minutes, and in cities and localities outside the City of Paris the charge is 2 cents for a conversation of three minutes.

The toll for night conversations between towns where there is night service (9 P. M. to 7 A. M.) is three-fifths of the day toll. The charge is made from the time the station called, answers.

The Department will contract to provide interurban conversation at a fixed hour during the night but these conversations must take place each night for a period of one month.

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643

### Germany.

The telephone system in Berlin and throughout Germany is state owned and operated as a branch of the Imperial Postal Service under the direction of the Postmaster General. The City of Berlin has an area of about 25 square miles and a population of 1,930,327 as of December, 1904. Officialism appears to be the dominating element. The number of telephones installed is 82,950, which gives a development of one telephone to about 20 persons. The first Berlin Exchange was opened in 1881, and the first long distance line was opened in 1885 and connected the Stock Exchange of Berlin and Magdeburg, a distance of about 110 miles. So exclusive is the telephone monopoly that a law has been passed which subjects any person who starts a telephone system without permission of the Government to six months imprisonment.

The City of Berlin is divided telephonically into nine districts. Each is supplied with a central exchange and there are 18 smaller exchanges in the various suburbs. One exchange is installed in Charlottenburg, which is considered part of the Berlin system.



The service given can only be described as cumbersome and slow, but is satisfactory after the connection has once been obtained. The reason for this is due to the fact that the exchange equipment and operating methods are not uniform. The exchanges are equipped with both full magneto systems or with magneto ringing and automatic signaling.

Almost every exchange was operated on a different system, some exchanges were equipped with single cords, others with double cords, some were fitted with lamp signals and others with drop-indicators, some were on the earth-circuit principle and some on the metallic principle, whilst the exchange at Charlottenburg was the first in which central battery talking was introduced. These different systems obviously required different handling of the apparatus both at the switchboard and at the subscriber's telephone, and variations arose, with anything but satisfactory effects, in all connections between exchanges with different systems. To determine whether a conversation was finished the operator had to distinguish between like and unlike connections. The average number of times an operator "broke in" to each call reached the astounding average of 9. This statement was furnished as one of the reasons for the necessity of remodeling the system.

The different exchanges are not all connected with each other by trunk lines and it is sometimes necessary for a subscriber, when he desires to talk with another subscriber connected to another exchange, to work his own way through, from one exchange to another, until ultimately he arrives at the exchange at which the wanted subscriber is connected. When connected he has to do his own ringing.

The cause of this multiplicity of systems I think was due to the rapid development and to the fact that the administration being unable to decide which was the best system to uniformly install seized every occasion to "try out" the advantages, or otherwise, of new improvements. There are no party lines in Berlin but there is a curious arrangement which permits the installing of 5 extension instruments on a direct line. The exchange is connected with the subscriber who has the direct line. He in his turn is connected with the five other subscribers. Anyone of the subscribers with an extension instrument desiring to make an outgoing call, can call the exchange direct, but incoming calls, for any of these extension stations must be reached through the station of the subscriber having the direct line. Experiments have been made with the "Strowger" Auto. Telephone System and a small exchange of about 200 stations has been installed for which a flat rate charge of \$60.00 per annum is made. Some of the principal bankers, the larger mercantile houses, and the officials of the Post Office Department are connected. The Telephone System in Berlin, local, trunk and toll, is now undergoing reconstruction and it is officially stated to be the purpose of the Department to equip the whole of the Berlin area with a complete common battery system of exchanges and abolish the present practice of working from exchange to exchange, as explained. It is purposed to do this within the next two or three years, but it will

probably, in my opinion, take at least six years, if not more, for the reason that the Department is so clogged with officialism that progress is made at a very low rate. The exchange at Charlottenburg has an equipment of 5,500 lines, and being the most modern exchange in the Berlin area, is the "show exchange" to which all visitors are conducted, without fail. To give an idea of the general upkeep of the Berlin system, I was informed that at this exchange alone they have an average of 100 cases of trouble per day. Discipline amongst the operators is conspicuous by its absence and they appear to do very much as they please. They are not trained in a telephone school, but acquire a knowledge of their duties at the switchboard. They are provided by the Department with a sitting room fitted with lockers and scantily furnished; stoves for warming their meals are also provided. The toilet facilities are extremely meagre. It is my opinion that the operators are not well informed

or especially intelligent. For the first two years they are  
645 paid at the rate of 60 cents per day; the third and fourth year at the rate of 72 cents per day. After they have been in the employ of the Department for 9 years they are placed on the regular list, when their salary amounts to \$360.00 per annum, and they are allowed \$129.60 per annum for additional expenses. They hold their positions for life, unless removed for cause, and are beneficiaries, under the General Pension System, which applies to all Governmental employees. Their hours of labor totals 6 per day in one shift and they must make a total aggregate of 42 hours per week.

The lineman, cablemen, and installers receive from 72 cents to 96 cents per day. They work seven, eight or nine hours a day, according to the season of the year, and, although there is no allowance for overtime work, yet they are paid, when, owing to the inclemency of the weather, they cannot do outside work. The Department has free use of the highways so long as its poles do not obstruct traffic, and free access is had to the very extensive right of way possessed by the State railroads. Although the rights of abutting property owners are not recognized, the Department is obliged to obtain the consent of a municipality to install pole lines or conduits within its limits. The Department is obliged to pay owners of property for any damage which may result from the trimming of trees. But only the actual damage which is done must be paid, and it is not necessary to notify the owners before trimming the trees.

The capital investment for the whole of the telephone system was \$67,513,000.00. The Department obtained the money for the carrying on of the telephone system from the Reichstag, and the appropriations are made in the ordinary and the extra-ordinary budgets. The Department until five years ago did not regard the money it obtained as a loan, but since that time the money advanced for the Department's various needs is regarded as a loan. However, no time is specified for its repayment, and no allowance is made for refunding interest or depreciation, neither does it pay taxes or allow anything for the rental of the buildings which it occupies. No detailed statement is given of its receipts and expenses, and the only statement it does make regarding receipts and expenses is a statement

of the joint receipts and expenditures of the combined Post Office, Telegraph and Telephone systems. A separate statement is made of the yearly receipts of the telegraph and telephone system, but no information is given concerning the expenses of operation, nor is any general statement given regarding capital accounts. The receipts and expenditures and surplus of the combined postal, telegraph and telephone service for the year ending 1903, which were the latest published statistics at the time of my visit is as follows:

Receipts .....	\$111,625,538.00
Expenses .....	99,149,221.00
Surplus.....	<u>\$12,476,317.00</u>

It will be of interest to note that before telephone service could be obtained it was necessary for the intending subscriber to secure written permission from his landlord. It was extremely difficult to locate a call office, there being only 142 in the whole area. These were chiefly confined to Post Offices, and before permission could be secured to use them one had to undergo a sort of star-chamber examination. It is only recently that Berlin has given a continuous service. It was the custom to close down the plant at 10 o'clock in the evening. Recently the long distance system has been receiving considerable attention in its development. The sum of \$4,080,000.00 was spent during the year 1904 for improvements and extensions. The Department exercises considerable discrimination, however, in establishing long distance connections between localities. Citizens of the locality desiring long distance service must guarantee that the annual earnings of the exchange, for the first five years after installation, will be 5 per cent. of the cost of the installation; if the earnings are not equal to the guarantee, the deficit must be paid by the locality.

The rates for Long Distance Services are as follows:

Up to 15.5 miles.....	4.3 cents for 3-minute period
From 15.5 to 32.0 miles.....	6 cents for 3-minute period
From 31.0 to 62.1 miles.....	12 cents for 3-minute period
From 62.1 to 310.6 miles.....	24 cents for 3-minute period
From 310.6 to 621.2 miles.....	36 cents for 3-minute period
Above 621.6 miles.....	48 cents for 3-minute period

There are special rates to foreign countries. The time during which a person may use a long distance line is limited to one or two three-minute periods. Should there be another call waiting the line must be surrendered at the end of the second period, but if a line is not wanted this period may be extended to another three-minute period. A subscriber using a toll line is not notified when a three or six-minute period is completed and is cut off without warning. The long distance service is subjected to very long delays and is unreliable. Especially does this remark apply to the line between Berlin

and Paris, which is fair one day and absolutely useless the next. The number of long distance circuits are quite insufficient and this fact has been the means of establishing a gross imposition known as urgent rates. This is a system which permits a subscriber, by paying three times the ordinary toll-charge, to obtain precedence over an ordinary message. An actual experience will explain the working of this clearly. A friend of mine desiring to talk from his hotel in Berlin to the United States Consulate in Munich, a distance of 411 miles, ordered up the connection. He was informed that the lines would be busy for a long time but by paying three times the ordinary amount of the toll-charge immediate service could be given. This was agreed to but 35 minutes elapsed before the connection was ready. Then it was found that the wrong number had been given, and when the United States Consulate was ultimately secured it was impossible to talk. Not only was it impossible to talk but also to get the fee returned. I attach herewith the rates for the Berlin area, and would mention that each message rate subscriber must guarantee 400 calls per annum. The average traffic per day of all stations on the Berlin system was 11.5 per station. The information was given me that the average call per day on message rate lines were 3. calls per station per day. The flat rate service is the more popular in Berlin, being adopted by roughly 70% of the subscribers.

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649

### Stockholm.

The telephone systems in Sweden are principally in the hands of the state. There are, however, twenty-three small systems which possess just over one thousand subscribers. They are principally co-operative systems and resemble the mutual co-operative systems of the United States. There is at present only one large private company which carries on business principally in Stockholm. This town is one of the largest in Sweden, having an area of just over twelve square miles, and a population at the end of 1904 of 318,438. Supporters of competitive telephony always give statistics of this town in support of their theories. It is practically the only large town in Europe in which there is active telephone competition. I spent some time in studying the system, owing to the fact that it has a reputation of being the best developed town, telephonically speaking, in Europe. Some figures have been published stating that this development has reached the proportion of one telephone to each six inhabitants. If these figures were correct Stockholm would be the highest developed telephone town in the world. I do not, however, agree with these figures as I found that of the eleven thousand telephones operated by the state system, nearly eight thousand were duplications. However, Stockholm is undoubtedly the best developed city in Europe, and in my opinion gives the best service. The City of Stockholm, with the sanction of the Crown in 1878, granted a perpetual concession to an organization called the Bell Telephone Co. of Stockholm, to operate a telephone system within the limits of the city. The Company is required to conform

to the City and Royal regulations concerning the use of the streets and highways, but it is not required to pay any general compensation to the City or Crown under the terms of the concession.

In 1883 the Stockholm General Telephone Company, which is also known as the Allmanna Company, received a 50-year concession from the City, permitting them to operate a telephone system in an area extending in a radius of 43.5 miles from the "Great Market" in the City of Stockholm. This area practically includes the whole of the city and the province of Stockholm. The concession did not require the payment of any compensation for the use of the streets on the part of the Company, and the same regulations regarding the use of the streets and highways are enforced, as in the case of the Bell Company. The concession, however, gives the City the right to purchase the property of the Allmanna Company at its termination, by the payment of the then physical value of the property. Competition ensued between these two companies until 1885 when the Allmanna Company obtained the controlling interest in the Bell Company. Both companies, however, are still operating in the City of Stockholm where they have seven very fine exchanges, all operated on a magneto basis, the largest of which has a capacity of 20,000 lines. They act in conjunction with each other and are practically one system.

In 1889 the Government built an exchange in the City of Stockholm and began active competition with the Company. The toll lines at this date were very scanty but what there were of them were connected with the Bell exchange in Stockholm. Since 1889 the Government has secured greater appropriations, and has developed the system throughout the whole of Sweden. Intercommunication was given between the Allmanna, Bell and the Government systems until 1903, for which a charge of 2.7 cents was made. The Government proposed a reduction of 1.35 cents per message but the private companies rejected this proposal on the ground that such a reduction due to the difference in the rates charged would be entirely to the benefit of the Government. The question became very acute and resulted in the discontinuation of the inter-communication between the systems. This caused great indignation among the citizens of Stockholm, and the public press took up the question very strongly.

Very great pressure has been brought to bear by various interests to compel the renewal of inter-communication, and the city authorities have refused to grant further rights of way to either company until inter-communication has been renewed. This state of affairs has created an extraordinary arrangement termed an "Exchange Bureau." The Allmanna Company rents a Government telephone and employs an operator to repeat messages which are received over its lines for subscribers of the Government system, or over the Government lines, for the subscribers of the Allmanna-Bell system for which they make a charge of 2.7 cents per message. The Government has the same practice for which it charges 1.37 cents for the same service. Some negotiations have taken place between the Government and the Allmanna Company for the purchase of the latter's property. A price was agreed upon but the Swedish

Parliament refused to sanction the proceedings. The Allmanna Company furnishes an unlimited service only and the Bell Company furnishes a measured rate service only. Subscribers of either company can converse over the whole of the area at the rates quoted. The Allmanna Company has some peculiar features. Some subscribers, termed "star subscribers," may be called by a message rate subscriber, on the Bell system, without any charge to the latter although he is a message rate subscriber, and they themselves have unlimited service between subscribers in both systems. This class of service is extremely popular amongst the provision stores, etc., and there are over 9,000 subscribers in this class. The star subscriber pays for this privilege the sum of \$6.40 per annum. Ordinary flat rate subscribers pay what is termed an entrance fee of \$13.50.

This is represented to be their proportion of the cost of installation and may be paid either in one sum or in installments of \$2.70 per year. When there is a line on the subscriber's premises no entrance fee is required. These subscribers have unlimited service to the Allmanna subscribers only. There are just over 6,000 in this class. Measured rate subscribers to the Bell Company pay an entrance fee of \$2.70 in addition to their per annum charge of \$12.15 which entitles the subscriber to free communication with all starred subscribers in the Allmanna system, and to 100 free messages quarterly to Bell subscribers. All excess calls are charged at the rate of 2.7 cents per message. The Company has also established a type of service known as "express service," for the subscribers in the City of Stockholm who may wish to reach a country subscriber quickly. Express calls take precedence over the regular calls, and 2.7 cents is charged for each three-minute period, or part, for this type of service.

652 The pay station rate of the Allmanna Company is 2.7 cents per message, whilst the pay station rate which is charged by the Government is 1.35 cents per message. In connection with this matter one of the first things that attracted my attention was the number of call stations which are at the corners of almost every square. It is not considered correct form for a lady to enter a saloon, and drug stores are not to be found on every corner. So these call stations, which are very ornamental, supply a real public need. I was unable to obtain any official figures concerning the amount of traffic produced by them, but from my own observation I should say that it was quite a large amount. The Swedish Government has practically cut the rates of the private companies in half, as they charge a flat rate of \$13.50 per annum, with an installation charge of \$13.50. This is \$7.10 less than the average charge made by them in other cities. The Government, although having the advantage of long distance connections for its Stockholm subscribers and charging cheaper rates, has less than one-half the number of subscribers which the combined companies have. In fact, the strength of the Government system in Stockholm is due solely to the reason that it can furnish long distance service. The strength of the private companies is amongst the smaller merchants who do not use the telephone outside of the city, in the apartment houses, and amongst the residents of the suburbs of Stockholm, which are within



the area. The large merchants and the commission houses use both the Government and the Company telephones on account of the long distance facilities they provide. However, the local use of the Government system is very much less than that of the Company. The Telephone Department has the general right to erect pole lines along the public highways and railroad rights of way, but is obliged to pay for right of way over private lands, and must obtain the right of the Crown to cross a highway. The case of the City of Stockholm is an instance of the control a municipality has over its streets. It has refused the right to permit the Department to install an underground system of conduits; as a result a large portion of the Government system of Stockholm consists of overhead wires, and the appearance of the large iron fixtures which are attached to the buildings and which carry hundreds of wires is very marked. The Government operates with one large magneto exchange which is maintained in a very efficient manner. The operators are paid at the rate of \$4.13 per week, whilst the linemen and repairmen average \$5.45. The operators work for the Department for five years only when they are discharged with a bonus of \$81.00, given for good service. I cannot see any sense or reason in such an arrangement, as it is my experience that after this period of service an operator has

653 just reached her maximum efficiency. They work 7 hours a day, which is divided into two periods of three and four hours.

The average number of calls is stated to be seven per station. The Government freely admits that the Stockholm exchange is losing money, and that the profits of the telephone department are derived from the other towns where much higher rates are charged and from the toll lines.

The long distance lines are all State owned, and as far as my experience goes, give poor service. The lines are noisy and the transmission is poor. Some of their toll lines are composed of what is termed "grounded circuits." A person must pay for the service as soon as the connection is made, and can use the line for two consecutive three-minute periods only, when a three-minute period must intervene. Double rates are charged for express messages, and they take precedence over regular messages and are used extensively during the day on account of the insufficiency of the long distance circuits to take care of the traffic. The Department has also established a type of service which is known as a "serial conversation." This is the nearest approach to what is termed in America as "appointment calls," which can be found in Europe. Serial conversations must begin at a certain time and be of a definite duration. They must include twelve conversations which shall be equally divided throughout one calendar month, and the order for the serial conversation must be given three days before the commencement of the period. The price for this type of service is double the regular long distance rate. There is international service between Norway, Denmark and Germany.

The Department has obtained the money for the Telegraph and Long Distance telephone lines from state appropriations, but the money for exchanges in different cities and towns has been



obtained in many cases from the public funds. There was no provision made for the repayment of the principal or the payment of interest on a large portion of the money which was first advanced by the state, but the money which was advanced from the different funds was loaned for twelve-year periods, and interest paid at the rate of from 3 to 4 per cent. per annum. The receipts from the Telegraph and Telephone systems are kept separately, but the expenses are kept jointly so it is impossible to get any idea as to the financial success or otherwise.

The Telegraph and Telephone Department, according to its statement for the year ending December 31st, 1904, claims that the total property of the Department represented a valuation of \$10,-  
654 308,597.00, and of this amount the sum of \$7,840,124.00 is stated to be "assets over liabilities" and the remainder, amounting to \$2,468,473.00, is that portion of the Department for which a sinking fund is created and on which interest is paid.

The Department has expended in the building of the long distance lines and in the purchase of exchange systems the sum of \$8,391,-666.00 between the years 1881 and 1905. The principal portion of the so-called "assets" of the Department, amounting to \$7,840,-124.00 is composed of telephones and pole-lines which are valued at over \$5,400,000.00.

The Department expended during the year ending Dec. 31st, 1904, the sum of \$409,812.00 for the maintenance of the Telegraph and Long Distance Telephone lines and the exchanges, which is less than 4 per cent. per annum on the present stated value of the property of the Telegraph and Telephone Departments.

The sum of \$409,812.00 is the only item which appears in the accounts of the Department for the maintenance of the property, and no allowance is made for depreciation, as the Department claims that the property is properly maintained out of earnings, the fictitious and unsound valuation in the item of "assets over liabilities" amounting to \$7,840,124.00 becomes apparent.

The former and present statements of the Department, furthermore, do not show any provision for renewal of material and property.

The profits of the Telegraph and Telephone Departments according to its statements for the year ending Dec. 31st, 1904, amounted to \$138,546.00. This is between  $5\frac{1}{2}$  and 6 per cent. upon the sum of \$2,468,475.00 for which the Department creates a sinking fund and upon which it pays interest and probably considers as its present capital.

The manner in which the figures of the Department are presented, and the padding of the "assets" is an excellent example for the way in which the figures of many of the continental Telephone and Telegraph Departments are presented and there can be no doubt that if the Telegraph and Telephone Departments made proper allowance for depreciation upon its property and was obliged to create a sinking fund and pay interest for all moneys which it has obtained at different times, the alleged profit which it shows at the present time would be converted into a deficit.

655 The combined capital of the Allmanna-Bell companies amounts to \$1,039,500.00, and is divided as follows:

Allmanna .....	\$739,500.00
Bell .....	270,000.00
	<hr/>
	\$1,039,500.00

The Allmanna Company pays dividends of eight per cent. and the Bell Company pays dividends of six per cent. annually upon their respective capital stocks and are well thought of financially; the stock of the Allmanna Company selling at a premium.

The Allmanna Company, in addition to operating a telephone system in the City of Stockholm and the surrounding territory, is also interested in the installation and operation of exchange systems in the cities of Moscow and Warsaw, and the accounts of the Company contain a statement of the finances of the Company's foreign business as well as those of the Stockholm system.

The expense of the operation of the Stockholm system are carefully concealed and are presented in such a way that they do not show the amounts which are expended for wages and maintenance.

The Profit and Loss statement of the Company simply states that the "Income" from the Telephone Department was \$199,788.00 "after deducting expenses of upkeep," and this amount is credited along with the profits which are derived from the other affairs in which the Company is interested. The Company shows a net profit amounting to \$189,971.00 for the year from all the different branches of its business.

This profit would be reduced by \$108,635.00, or considerably over fifty per cent. if the Company relied solely on the Stockholm telephone system as its source of profit. The gross income which it is stated is derived from the Telephone Department amounting to \$199,788.00 should be charged with \$118,447.00 for rents, salaries, taxes, improvements, and a sinking fund of two per cent. upon the value of the Company's plant. This latter allowance of two per cent. is set aside annually and is the only provision made for depreciation and sinking fund by the Company.

It will therefore be seen from the foregoing figures that the net profit which is derived from the telephone systems is about \$81,341.00, and is less than half of the Company's net profits; the balance of which are derived from other sources, as already stated.

The fact that the Company is able to operate at a low cost and to furnish service at the prices which it does, may be accounted for in several ways, but all of them may be said to be purely local or  
656 national. The frugal customs of the Swedes, the general cheapness of materials, and the small wages paid are material factors in the general results.

The Stockholm area is small and compact, and the extensive use of large buildings for business and living purposes renders possible the installation of a large number of telephones in a small area.

The Allmanna Company is well administered and strict attention and careful personal supervision is given to all details of the

business by the officials of the Company. The Company employs a small number of employ  s to accomplish a large amount of work, pays low salaries and wages, purchases materials and supplies in large quantities at the cheapest possible figure, and contracts with individuals for a large portion of its work.

Following are some instances of the foregoing conditions and practices:

The number of employ  s of the Allmanna-Bell Company was as follows on December 31st, 1904:

Allmanna .....	709
Bell .....	133
<b>Total .....</b>	<b>842</b>

Of this total of 842 employ  s, 447 were operators.

The Company pays its Chief Engineer \$1,600.00 per year, and the wages of the other employ  s are proportionately low and have already been given in the schedule of salaries and wages.

The Company does not build lines or install telephones outside the City of Stockholm, but contracts with some local engineering firm of electricians to do the work. The Company sets the poles and supplies the material, and the remainder of the work is done by the contractors. It also makes contracts with local electricians to maintain the country lines and stations, and in this way claims that it can maintain lines cheaply and accomplish the results which it does with a small force.

The Chief Engineer of the Company claims that it is able to maintain and operate stations at an average cost of \$4.95 per annum, and is able to contract for the maintenance of subscribers' lines and stations outside of the City of Stockholm at 81 cents per station per annum and upward, according to the length of the line from the Central office.

657

#### Switzerland.

Switzerland is the smallest of all European countries, its total population at the last census being 3,315,443. The telephone system has until recently been in a somewhat backward condition, the total development being 1 in 70. However, the telephone system is now being developed along modern lines; large grants have been issued and reorganization is proceeding on a fairly large scale. Especially does this *to* apply to the long distance lines. One circuit from Switzerland to Germany, which was the first to be reconstructed, has been built on the most modern principles, Pupin coils being used in its construction. In my opinion it is the best constructed line on the continent, and gives most efficient service. The telephone system throughout Switzerland, with the exception of the town of Zurich, has always been owned and operated by the Federal Parliament as a branch of the telegraph system. In 1880 a five year franchise was given to the Zurich Telephone Company for setting up of a telephone system in Zurich. This was acquired through purchase by the Fed-

eral Government in 1886, and it has from that date had sole control of the entire telephone system of Switzerland, as the parliament had definitely decided as far back as 1880 that the telephone system should be carried on by the Government. The purchase of the Zurich Telephone Company must, therefore, be regarded as only a measure taken to promote the development of the Switzerland telephone system. The department has free access to the highways and public thoroughfares, and has the use of the extensive right of way of the state railroads. When it is necessary to use private property for the suitable erection of lines, in many cases permission is obtained from the proprietor to set up poles without asking compensation; in other cases a payment is made once for all according to mutual agreement. On an average this payment amounts to about one dollar per pole. At the time of my visit to Zurich the city had a population of 150,000. There were 6,000 stations which gave a development of 1 telephone to each 25 inhabitants. Considerable reconstruction was then in progress, as owing to the use of high tension traction systems a large number of subscribers on grounded circuits were unable to get satisfactory service. The system used was a full magneto service, and in the cases where metallic circuits were used, was fairly satisfactory but awfully slow.

The calling rate was extremely low, averaging 3 per day. One of the interesting features of the service was the right of subscribers to send what was termed, "Phonograms." The subscriber could call up his exchange and dictate a message which would be written down and sent by messenger to the address given. The charge for this varied, with the length of the message and the distance from the exchange to the address given. Call stations were divided into two classes. (a) "Subscribers stations" which are authorized for public use, (b) "Public Call Stations" which are erected by the management exclusively for the public service. The subscriber's station is selected after arrangement has been made with the subscriber. He is obliged to place his station at the service of anyone, and he is responsible to the management for good attention to service and for correct payment of charges. However, he retains all the rights and responsibilities of an ordinary subscriber. The duration of a call is limited to a period of three minutes. The subscriber who permits his station to be used in this manner receives for his service the following shares; 1 cent for each local call; 2 cents for each toll call, and a commission of 2 cents for each phonogram. Public call stations are only set up in buildings where hotel service or tavern business is carried on. Special soundproof compartments are provided. In the outlying districts groups of subscribers may be connected with the exchange by means of what is termed a switch-station. This is a specially constructed line and is built to one of the subscribers who has been selected by the group. At his station a plug annunciator board of the requisite size is established, and all the other subscribers in the group have their lines connected to this board. This subscriber practically acts as an operator. For his services he receives an amount which is fixed according to the number of conversations, and his yearly subscription for

his own telephone is reduced to \$3.86. The subscribers connected through the switch-station have to pay in common the charges of the expense of the line connecting them with the main system, and each individual subscriber pays the cost of his own line beyond the length permitted free. The subscribers choose a delegate who is authorized to be their representative to the management. He is responsible for the charges due by the other subscribers and has to provide two securities for fulfillment of his obligations. The subscribers pay the same general rate as ordinary subscribers and also a yearly contribution of \$3.86 toward the expenses of the switch-station service. They must also pay the message rate, whether the call is either amongst themselves or to the exchange.

In the long distance service the duration of a conversation is considered to have begun immediately the called station replies, and the conversation is charged for whether the wanted subscriber is present or not.

659 & 630 The subscriber who on account of the improper handling of his telephone or through neglect of the official instructions regarding the use of same causes delay, or makes a conversation impossible, can be charged for the length of time taken up according to the rate of same. Some of the exchanges do not give a continuous service, closing down at 9 P. M. There is, however, always an official in charge, and should he be called up after this hour, or before 7 A. M., he is entitled to a special payment of 10 cents for each conversation, without regard to its duration or whether the call is effective or not. The measured service system of charging is the universal system throughout Switzerland, and as this is the only country in Europe which offers exclusively this method of charging, I inquired as to the reasons. It was explained to me that the average cost of the installation of the whole of the subscriber's apparatus was taken. This was divided into two parts and included in the first two yearly charges. The basis charge payable during each succeeding year was the average cost of the maintenance of the line and the amount set aside for depreciation, whilst the charge made for each message represented the actual cost of operating, plus a necessary profit. To my mind there is a great deal to be said in favor of a similar rate as part of a schedule in a large town. But as a hard and fast rate for large and small towns, villages, etc., I do not think it suitable or equitable. It was my understanding that in the reconstruction, a schedule of rates based on the message rate plan, but much more elastic so that a telephone might be found in every house, was to be drawn up. As far as I know, or have been able to ascertain, the rates have not been changed. In my opinion, if the department would introduce into Zurich a two-party service for the smaller business people and a four-party service for the residence portion, with yearly charges based upon the plan as stated for the direct single line, it would be an almost ideal exposition of the correct method of charging for telephone service. The latest balance sheets which I have show that the total amount expended on the system was \$6,446,472.00. The revenue was \$1,411,913.00; total expenditure, which includes management, operating expenses, maintenance depreciation, \$1,443,210.00, showing a loss on the whole

system of \$31,297.00. The yearly amount of sinking fund set aside for construction, is 15 per cent. of the capital.

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661 The subscriber is bound to guard his station and the connections existing inside his premises against all damage and is responsible for any loss accruing to the management through his own fault or another's fault.

By giving notice, a month in advance, any subscriber may declare his intention of withdrawal. Should withdrawal take place during the course of the first year a compensation of \$7.72 is required. In addition to this should the station be outside of the "free" limit, \$5.79 is required. For moving a station into another house or premises, a fixed charge of \$3.86 is made. If a telephone arrangement already exists in the new residence into which the subscriber moves, then the subscriber has merely to pay the actual costs of moving the station including the expenses of disconnecting his former station when this is necessary. When a subscriber gives up his station in order to take up at once a new station in another exchange, he can only retain the privileges resulting from the duration of his period of

662 subscription, by paying all the expenses for the setting up of the new line and the fixing up of the new station and by continuing to pay his subscription without interruption. If the subscription should not have lasted two complete years, then besides the foregoing he will also have to pay the expenses of disconnecting his former station and its connecting wire if it should be necessary. The subscriber has to make arrangements so that the installation of the station can be made without hindrance or expense. He has also to make any necessary arrangements so that the management shall have to incur no expenses for cutting branches of trees or fixing up supports for the wires. The management decides as to the kind of telephone to be supplied to subscribers. For setting up a movable station an additional sum of \$5.00 is required.

Respectfully submitted,

(Signed)

WALTER F. BURGESS.

662½ *Report of Hugo S. Grosser, City Statistician.*

663 & 664 *Report of Hugo S. Grosser, City Statistician.*

City of Chicago.

Bureau of Statistics and Municipal Library.

Hugo S. Grosser, City Statistician,  
Room 409, City Hall.

DECEMBER 31, 1906.

To the Honorable, The Committee on Gas, Oil and Electric Light.

GENTLEMEN: Herewith I beg to submit for your consideration a brief report on the telephone question. It is the result of the careful perusal of the testimony presented before your Honorable Com-



mittee, and of the study and examination of numerous papers on the question. The statistical table attached hereto is based upon the reports of the United States Census Bureau, published in January, 1903.

I have principally dealt with the following three phases of the entire question:

First—Monopoly or competition.

Second—Measured or flat rate service.

Third—The rate question.

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665

## 2. Measured or Flat Rate Service.

Modern opinion favors the "pay for what you get" principle. It seems that this is the only just and equitable method for the consumer and producer as well, and throughout our private and public business life, this principle has been adopted with but very few exceptions. One of these exceptions has been the telephone business, because in it the idea seems to have been extant that it consisted of renting telephone instruments rather than rendering service. During the last few years, however, the correct idea as to what the telephone business consists of, has taken root and has spread fast. Were it only a question of renting telephone instruments, a flat rate for the same class of instruments would be just, but the renting of the instrument does not complete the telephone business but rather makes it possible to begin it.

It is a well understood fact that while with the increase of business the whole cost thereof becomes naturally greater, at the same time the cost of every single article is reduced. But in the telephone business the cost of each article sold, that is, the message, increases proportionally with the increase of the traffic; or, in other words, the more instruments a company rents, and the greater use of the telephone thereby resulting, the greater becomes the cost of each individual message. The reason therefor is quite plain. The number of messages increases in a greater ratio. To illustrate: If only one thousand (1,000) telephone instruments are in a town, each one of the telephone subscribers is able to talk with each one of the thousand, or the total number of calls possible would be one thousand times one thousand, or one million. When, however, the number of instruments grows to one hundred thousand, the number of possible calls would increase to one hundred thousand times one hundred thousand, or ten billions. It is, therefore, clear that while the number of instruments has increased one hundred fold, the number of possible calls has increased ten thousand fold, and it is plain that this vast increase requires much more labor in proportion than the mere increase of instruments would seemingly demand. Further, the quality of service becomes much involved by the large increase of possible calls, and the greater this increase the more difficult becomes the service, and I believe that at some limit, service of any kind would become an absolute impossibility. If, for instance, of the one hundred and thirty thousand subscribers in Chicago

666

only one-half would be using their telephones constantly, good service would be out of question.



No one can successfully deny that a flat rate will cause the telephone to be used much more frequently than if each call would have to be paid for separately, as with an unlimited service much abuse through unnecessary calls cannot be avoided. Thus the lines become overloaded, and the service interfered with. Where a measured rate exists and every call must be paid for, the telephone will be used much more discretely and limited to the actual needs, thus easing the load and enabling the company to render much better service.

However, not only the cost of operation and the quality of the service must be considered, but the telephone subscriber himself demands the first consideration. To him a flat rate seems to be an absolute injustice, because the small user is thereby forced to pay the same rate as the large user. This is beautifully illustrated by the two-fold proposition offered by one of the companies seeking a franchise from the city. The Manufacturers' Company offers a flat rate and a measured rate, leaving the option to the subscriber, its flat rate to be \$90.00 per annum for unlimited service. If a telephone user wishing to avail himself of the measured rate uses daily an average of but seven calls on a basis of three hundred days per annum, or twenty-one hundred per year, under the offered rate of the company, he would have to pay therefor \$87.50. If he used an average of eight calls a day, it would cost him \$95.00 per year; if ten calls, \$110.00. Under the flat rate he can use his telephone as often as he wishes. From forty to fifty calls is perhaps the possibility of a telephone per day, and it does not seem just, why a man should be obliged to pay for eight calls, either more under a measured rate; viz.: \$95.00, or as much as under a flat rate, as the man who uses his phone twenty, thirty, forty or fifty times per day. Thus it would appear that the measured rate offered is much too high as compared with the flat rate, yet it does not seem possible to reduce that rate to such an extent as to successfully compete with the flat rate. Even if reduced to one-half of the present rate, a man who uses thirty calls per day, or nine thousand per year, would then have to pay \$108.75, or \$18.75 more than the offered flat rate of \$90.00. In order to do away with this palpable injustice the only possible thing to do is to abolish all flat rate service.

As far as I have been able to learn the best telephone authorities and experts all over the world declare themselves unreservedly in favor of the measured rate system.

667 In his recent report of November 21, 1906, Mr. Harry P. Nichols, in charge of the Bureau of Franchises of the City of New York, says:

"That this system (the flat rate plan), is unfair to many subscribers, is universally conceded. By it, the subscriber having a small business, and who uses the telephone infrequently, pays the same rate as the subscriber having a larger business, whose telephone instrument is in constant use. One pays too high a rate, and the other too low for the service rendered, and this would be particularly true in New York, where the use of the telephone varies so materially among the different subscribers."

The Merchants' Association of New York, in its "Inquiry Into the Telephone Service," of June, 1905, says:

"It is the opinion of this committee therefore, that in large cities the flat rate with unlimited service is based upon a fallacy; that it is extremely unjust to small users; favors large users unduly; impedes expansion of the telephone business; tends to inefficient service, and that as a financial proposition, it is unsound."

Prof. Frank Parsons, President of the National Public Ownership League, before the United States Industrial Commission, made this statement:

"I believe in the measured service plan for large places, but think the double flat rate (residence and business) simpler and better for small exchanges."

The German Imperial Commission, after a thorough investigation of the telephone question in its report of 1899, says:

"The most just method is to re-adjust the charges so that each subscriber shall pay according to use."

The English Parliamentary Committee, in 1898, reported in favor of measured rates.

In a letter published in the "London Times," July 13, 1904, Lord Stanley, the Postmaster General of Great Britain, states:

"The proper method of charge is that which was recommended by the Select Committee of 1898, under which the payments of the subscribers are fixed in proportion to their use."

Mr. John Hesketh, Telephone Engineer for the Australian government, in an article in the "Electrical Engineer," London, February 10, 1905, says:

"As to rates the proper principle undoubtedly is a guaranteed tariff, under which the user pays according to the amount of his use. It is a great mistake to base the telephone service upon a low flat rate for unlimited use."

The United States Census Bureau in its special report for January 23, 1903, on "Telephones and Telegraphs," prepared by Mr. Thomas Comerford Martin, expert special agent, with the co-operation of Mr. A. V. Abbott, says:

"The measured rate system is undoubtedly the logical one as the subscriber pays exactly in proportion to his use of the telephone, and instead of the large user securing service at a rate much below the cost of the service, and the small user paying much more than the cost, each user pays his proper share, the average return to the company giving a return on the whole investment."

### 3. The Rate Question.

The problem involved in determining telephone rates is the most difficult of the entire question. Even telephone experts and engineers have fallen down on it, as proved by the fact that there are some companies unable to pay dividends, and others who have sought to obtain an amendment to their franchise authorizing them to increase the rates originally agreed upon. There can be no such thing as a standard telephone rate, nor is it feasible to arrive at proper rates by means of comparison, for in the telephone business,

perhaps more than in any other, a reasonable rate must depend upon the exact condition as to area, distances, traffic, character of service, legal requirement, labor conditions, etc., prevailing in each particular locality. There are probably no two places in the United States where these conditions are exactly alike.

The fixing of the rate usually has been, and still is, left to the company seeking the franchise, although more recently here and there a tendency is observable on the part of the franchise-giving authorities to scrutinize more closely the rate submitted, and to hold them within well defined limits. What then, should be the rate? Generally speaking, the rate should be placed at such a figure as to allow the cost of operation and maintenance, depreciation, interest on the investment and a fair profit. The last named item, about which there is so much diversity of opinion, must, of course, be conceded as long as we may obtain telephone service through private enterprise only. With reference to the amount of profit, public opinion has undergone quite a change; where formerly not much thought was given to the matter at all, and 15 or 20 per cent.

669 or more were not considered especially high, to-day a profit or dividend of 5 or 6 per cent. on the actual capital invested without any regard to speculative values is deemed fully enough for all public utility enterprises.

Granting these premises a basis of fixing the proper rate must be found by ascertaining; *a*—the amount of the actual capital needed for the investment; *b*—the cost of operation and maintenance, including a reserve for depreciation; *c*—the amount required for interest and other fixed charges; *d*—an estimate of the amount of service to be rendered; *e*—the amount of revenue to be derived therefrom, to which lastly must be added the amount of profit agreed upon. To ascertain these correctly requires the careful work of a technical expert. There is no other way of getting at these facts. Comparison with other cities and a study of the data appertaining to other telephone companies will be of little help beyond the conveying of general ideas.

I present some data describing the telephone situation in the United States in 1902. I have compiled these from the United States Census Report, published January 23, 1906, and while the figures have, of course, greatly changed since that time, their general characteristics have probably remained the same.

There were in that year in the United States—not taking into consideration 994 mutual telephone systems as of absolutely no consequence—3,157 commercial telephone systems, of which 44 were operated by Bell companies and 3,113 by independent companies, incorporated and otherwise. They operated a total of 9,419 public exchanges—5,480 urban and 3,939 rural—with a total of 2,225,981 telephones, or stations—1,823,956 urban and 402,025 rural. Only 194 exchanges had more than 1,000 telephones each. Twelve of these in the twelve leading cities averaged 31,450 stations, the other 182 averaged 7,207 stations. Of the 9,419 exchanges 3,753 with 1,317,178 stations were operated by Bell companies, while the other 5,663 exchanges operated by independent companies had together 908,903 stations.

All commercial telephone systems had an authorized capitalization of \$541,080,781, or \$243.07 per station—\$382,988,687, or \$172.05 per station in stocks, and \$158,092,094, or \$71.02 per station in bonds. Of this amount there was outstanding \$347,336,793, or \$156.05 per station—\$273,388,432, or \$122.82 per station in stocks, and \$83,978,361, or \$33.23 per station in bonds.

The following table shows the distribution of the capitalization between the Bell and the independent companies:

Capitalization.		
	A. Authorized capital: Bell companies.	Independent companies.
Total stocks.....	\$264,132,000.00	\$118,856,687.00
Total bonds.....	41,764,400.00	116,327,694.00
Total capital.....	\$305,896,400.00	\$235,184,381.00
Average stocks per station.....	200.53	130.78
Average bonds per station.....	31.71	127.99
Average total capital per station .....	\$232.24	\$258.77
	B. Outstanding capital:	
Total stocks.....	\$198,298,969.00	\$75,089,433.00
Total bonds.....	34,971,967.00	39,006,394.00
Total capital.....	\$233,270,936.00	\$114,095,857.00
Average stocks per station.....	150.52	82.62
Average bonds per station.....	26.55	42.92
Average total capital per station .....	\$177.07	\$125.54

These figures show that while the Bell companies have outstanding almost twice as much stock per station as the independent companies, the latter are bonded almost twice as high per station as the Bell companies. The dividends paid on the total capitalization amounted to \$14,981,649, of which \$13,714,437 were paid by the Bell companies—6.9% on the stock and \$10.41 per station—and \$1,267,212 by the independent companies—1.6% on the stock and \$1.39 per station. As against this capitalization there were the following values taken for all the commercial systems together:

Item.	Total.	Average per station.
Construction and equipment.....	\$347,743,470	\$156.22
Telephone .....	16,210,515	7.28
Real estate.....	22,708,634	10.20
Machinery, tools and supplies.....	9,657,956	4.34
Total .....	\$396,320,575	\$178.04

It thus appears that the actual amount of money invested is considerably larger than the outstanding capital.

The gross revenues of all commercial systems in the year 1902 amounted to \$83,522,211, or \$38.87 per station, while the operating expenses, including general operation and maintenance, legal expenses, rentals and royalties amounted to \$56,591,746, or \$25.42 per station. To this must be added \$5,340,842 for interest on the 671 floating and funded debt, equal to \$2.39 per station, and \$2,950,182 for taxes, or \$1.32 per station. This leaves a balance of \$21,639,441, of which \$14,981,649, or \$6.73 per station were paid out as dividends, leaving \$6,657,792, or \$2.99 per station, which was reserved as net surplus. The table appended hereto shows the revenues, expenses, dividends and surplus per station for each state in the Union, and also the number of the Bell exchanges and independent exchanges in each state. From it, it will be readily seen how vastly these figures differ for each state ranging in revenue from \$67.21 per station in New York to \$19.28 per station in Iowa, while the operating expenses range from \$43.58 per station in Massachusetts to \$12.23 in Iowa. A close scrutiny of the table will also disclose the fact that the revenue, the dividends and the surplus were greatest in those states where Bell exchanges were predominant. The exact division of these items for the Bell companies and independent companies were not obtainable, though they would undoubtedly prove of great interest.

The total operating expenses may be further analyzed as follows:

	Total.	Per station.
Maintenance and legal expenses.....	\$13,254,959	\$5.95
Wages .....	26,206,065	11.81
Salaries of clerks, etc.....	4,635,273	2.08
Salaries of general and other officers.....	5,236,323	2.35
Rentals and royalties on instruments and apparatus .....	2,832,361	1.27
Rentals of offices and other real estate .....	2,492,676	1.11
Rentals of conduits and underground privileges .....	681,727	.30
Telephone traffic paid or due other companies .....	436,666	.19
Miscellaneous .....	815,696	.36
<b>Total.....</b>	<b>\$56,591,746</b>	<b>\$25.42</b>

It may be of interest to see how the two companies applying for a franchise in Chicago, the Manufactures' Telephone Company and the Chicago Telephone Company compare with these general averages.

*Manufacturers' Telephone Company.*

Proposed number of stations .....	110,000
Estimated capital per station .....	\$136.40
Estimated revenue per station .....	46.66
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Operating expense, not including taxes or interest, per station. ....	26.44
Taxes per station .....	.68
Depreciation per station .....	6.82
Interest per station .....	6.82
<hr/>	
Total .....	\$40.76
672 Leaving for	
Dividends and surplus per station .....	\$5.90
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Value of plant investment per station .....	123.06
Value of real estate per station .....	13.34
<hr/>	
Total investment .....	\$136.40

*Chicago Telephone Company.*

(Company's Statement for 1905, Including the Entire District.)

Total number of stations .....	143,223
Capital stock per station .....	\$97.75
Gross revenue per station .....	49.79
Operating expenses, including taxes and reserves for depreciation, insurance, etc. ....	38.44
Dividends per station .....	9.78
Surplus .....	1.56
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Value of plant per station .....	\$99.96
Value of real estate per station .....	10.54
Material .....	1.51
<hr/>	
Total investment .....	\$112.01

The figures of the Chicago Telephone Company would, of course, be increased if they would pertain to the City of Chicago alone without including the smaller exchanges belonging to the system.

In conclusion it may be of interest to consider briefly the rates submitted by the two companies. The only city in this country with which Chicago might be compared is New York, yet the rates prevailing in New York could hardly apply to Chicago as operating expenses, rentals of real estate and similar items are necessarily much higher there than here and traffic is considerably greater in New York. With the increase in the number of persons who can be reached by telephone the value of the service to each subscriber becomes greater. Hence the general rule that the rates in the large cities are higher than in small places. Just as an advertisement

placed in a metropolitan daily, reaching millions of readers, costs much more than the same advertisement placed in a small local paper with a limited circulation.

Considering first the rates submitted by the Manufacturers' Telephone Company, a closer inspection would indicate that this company bids for an unlimited service rather than for a measured service, for their measured service rates are so high that a business man having the choice of the two would certainly prefer the unlimited service. For this they charge \$90.00 for the direct line. For the

same amount under the measured rate they will only furnish 673 2,200 calls. For a two party line, unlimited service, their rate is \$60.00, while for the same amount under the measured rate they will furnish only 1,367 calls. Also for the same amount of \$60.00 under the measured rate on a four party line they would furnish 1,500 calls.

In their residence rates this inequality becomes still more apparent. For \$60.00 they propose to furnish unlimited service direct line, but only 1,433 calls at the measured rate; for \$45 they will furnish a two party line unlimited service and only 1,067 calls at the measured rate; for \$30.00 they will furnish a four party line unlimited service and only 675 calls at the measured rate. It seems improbable that a business man will pay for instance \$60.00 for 1,367 calls when he can get an unlimited service of the same kind for the same amount, or that a resident will pay \$45.00 for 1,067 calls on a two party line when he can get unlimited service of the same kind for the same amount. Thus it seems plain that this company makes a direct bid for unlimited service at a flat rate. If this is so, however, their entire estimate of revenue is based upon wrong premises for they estimate not only the number of stations for unlimited service, but also the number of stations for measured service plus the excess use over and above the annual allowance of guarantee for each station.

In the main their estimate is as follows:

#### Business Service.

5,000	Direct line unlimited service.....	@	\$90.00
6,000	Direct line each 1,900* calls per annum.....	@	82.00
10,000	Two-party line unlimited service.....	@	60.00
9,000	Two-party line each 1,300* calls.....	@	58.00
20,000	Four-party line each 900* calls.....	@	41.00

#### Residence Service.

3,000	Direct line unlimited service.....	@	\$60.00
4,000	Direct line each 1,200* calls.....	@	53.00
5,000	Two-party line unlimited service.....	@	45.00
7,000	Two-party line each 800* calls.....	@	36.00
7,000	Four-party line unlimited service.....	@	30.00
9,000	Four-party line each 500* calls.....	@	23.00

\*Measured service, including the estimated excess use.



This gives a total of 15,000 unlimited business phones and 15,000 unlimited residence phones, together with 35,000 measured rate business phones and 20,000 measured rate residence phones, or a total of 30,000 unlimited phones and 55,000 measured rate phones. From the above figures, however, it must appeal to everyone that the number of unlimited phones would be considerably larger than the estimate, as the inducement for measured rate phones is hardly

sufficient to appeal to telephone users. In order to secure 674 measured rate customers they would have to materially reduce their measured rates which by the way are at least for the small consumer somewhat higher than those offered by the Chicago Telephone Company. A man using 150 calls per month, or 1,800 per year would have to pay at the Manufacturers' measured rates \$79.00, as against \$78.00, according to the rates of the Chicago Telephone Company even at their monthly figures. But as already stated further above, I firmly believe that good service with so large a number of unlimited telephones would be an absolute impossibility.

The rate offered by the Chicago Telephone Company does not seem to be sufficiently low. In a former statement the company claimed that these rates would mean a total annual reduction of \$937,601 as compared with the revenue under the old rates. But inasmuch as they have always declared a dividend of 10% annually, and have a surplus amounting to \$855,194.79 at the end of 1905, and had reserves for all kinds of purposes, I believe that close computation by expert authority will disclose the possibility of still further reducing the rate while furnishing an improved service. Perhaps it might be found possible to charge for all calls over and above the number guaranteed two cents per call up to 10,000, and one cent per call for all above that number computed upon an annual basis. This would for instance make the annual charge for a man using 1,800 calls per annum \$72.00 as against \$78.00 under the proposed rate; or it might be possible to reduce the guaranteed number from 100 per month to 1,000 per year at the same rate and charge two cents for the following calls, which would make the annual amount to be paid by a man using 1,800 calls per annum \$66.00, or a reduction of \$12.00, as against the proposed rate. However, I have not been able to carry my investigations in this direction far enough to make any definite suggestions as to the rates to be adopted.

This entire study, the result of many hours of labor, is offered in good faith, and in an entirely impartial spirit; with no intent to favor or injure any of the applicants, and with the sole desire to aid in the solution of this difficult question.

Respectfully submitted,

(Signed)

HUGO S. GROSSER,  
*City Statistician.*

## 675 EXHIBIT "2" TO DEPOSITION OF JAMES E. CALDWELL.

Filed June 10, 1908. Dan. F. Elliotte, Clerk.

Annual Report of the Directors of American Telephone & Telegraph Company to the Stockholders for the Year Ending December 31, 1907.

\* \* \* \* \*

676 *Report of the Directors of American Telephone and Telegraph Company.*

NEW YORK, March 10, 1908.

To the Stockholders:

The results of the business for the year 1907, as shown by the Comptroller's statement appended, were as follows:

Profits .....	\$23,479,290.10
Interest .....	7,209,902.16
Balance .....	16,269,387.94
Dividends paid .....	10,943,644.00
Carried to Reserve .....	3,500,000.00
Carried to Surplus .....	1,825,743.94

The following were the corresponding figures for the year 1906:—

Profits .....	\$17,857,687.37
Interest .....	4,886,750.61
Balance .....	12,970,936.76
Dividends paid .....	10,195,233.50
Carried to Reserve .....	1,773,736.62
Carried to Surplus .....	1,001,936.64

### Subscriber Stations.

The number of stations at the end of the year operated directly by the associated companies which constitute our system in the United States was 3,035,533, an increase of 308,244. In addition to this number there were 755,316 exchange and toll stations connected to our system by our toll and long-distance lines, but operated by local, co-operative and rural independent companies or associations having sub-license or connection contracts. Adding also our telephones employed for private-line purposes, there was a total of 3,839,000 stations connected to the Bell system as against 3,070,660 stations at the close of the previous year, an increase of 768,340 stations.

The increase in the number of subscriber stations operated directly by our associated companies was less than last year, due to more rigid collection of bills and more careful scrutiny of applicants. As the average cost of connecting subscribers far exceeds the average annual income per station, permanency is more desirable than numbers. The result has been an improvement in the class of subscribers, so that, notwithstanding this smaller increase in subscriber stations, the increase in gross revenue is fully equal to that of former years.

## Wire Mileage.

The total mileage of wire in use for exchange and toll service was 8,610,592 miles, of which 1,141,687 were added during the year. These figures do not include the mileage of wire operated by sub-licensees.

## Traffic.

Including the traffic over the long-distance lines, but excluding sub-licensees, the daily average of toll connections was about 678 494,000, and of exchange connections about 18,130,000, as against corresponding figures in 1906, of 462,000 and 16,478,000; the total daily average for 1907 reaching 18,624,000, or at the rate of about 5,997,000,000 per year.

## Construction.

In the early part of the past year there were sighs of a coming change in general business conditions, and steps were taken to stop all construction not necessary either for immediate demand or to put the plant in condition to economically meet future demand. The result of this action has been satisfactory. The construction expenditures during the latter part of the year were largely reduced.

The amount added to construction and real estate by all the companies, excluding sub-licensees, constituting our system in the United States during the year 1907 was:—

For exchanges .....	\$44,184,800
For toll lines .....	4,426,400
For land and buildings .....	4,310,200
	<hr/>
	\$52,921,400

## Construction of Previous Years.

The amount added in 1900 was \$31,619,100; in 1901, \$31,005,400; in 1902, \$37,336,500; in 1903, \$35,368,700; in 1904, \$33,436,700; in 1905, \$50,780,906; and in 1906, \$79,366,949; making the grand total of expenditure upon these properties during the eight years \$351,835,655.

## 679 Maintenance and Reconstruction.

During the year \$36,626,637 was applied out of revenue to maintenance and reconstruction purposes.

The total amount of maintenance and reconstruction charged against revenue for the last five years was over \$147,000,000. This expenditure is reflected in the superior condition of the plant, the theory and practice being that the plant must be kept in standard condition at the expense of revenue.

## American Telephone and Telegraph Company Investment.

The amount contributed by the American Telephone and Telegraph Company in 1907 by way of investment in its own long-dis-

tance plant (\$1,285,000), in real estate (\$585,485), and in the purchase of stock and bonds and in advances to its operating companies (\$29,952,000), was in all \$31,822,485, an addition of about ten per cent. to its entire investment up to January 1, 1907.

### *Associated Companies.*

#### *Financial Condition.*

The associated operating companies of the United States (not including the American Telephone and Telegraph Company) commenced the year with rather an abnormal indebtedness. Measures were at once taken to bring this within the normal limits of current operations. This has been done and the obligations of those 680 companies to other than the American Telephone and Telegraph Company decreased for the year \$21,000,000, while the cash on hand increased at the same time \$1,500,000—a net improvement in such liabilities of \$22,500,000.

During the year the Western Electric Company decreased its indebtedness \$9,400,000 and increased its cash \$1,150,000, making a net improvement of \$10,550,000 for that company.

The total improvement of our associate operating and manufacturing companies in the United States was \$33,050,000, bringing the current and floating indebtedness of all the associated companies well within the limits of current operations.

#### *Construction for the Current Year.*

Estimates of all the associated operating companies and of the American Telephone and Telegraph Company for all anticipated requirements for 1908 have been prepared, thoroughly studied and considered in connection with available resources. Maximum expenditure in each case has been agreed upon, which is well within the available resources. All who are responsible for the expenditures are working in entire accord with these agreements and understandings, and it is believed that the results will be well within the limits fixed.

#### *Western Electric Company.*

The Western Electric Company desired to extend its relations with our company and the associated companies, and to cover with 681 its operations the entire telephonic field, whether connected with the Bell system or not. At the same time it was thought that the management, which would remain the same, if brought into closer touch with the general organization of the Bell system, could avoid duplication of effort in electrical and mechanical development and in this way and by the concentration of the purchase and distribution of supplies effect greater efficiency and economy.

To this end contracts have been made with most of the Bell companies, and the contract between our company and the Western Electric Company has been modified in respect to the sale of telephones and telephonic apparatus.

The business of the year 1907, considering the unusual conditions and the large contraction in business, was fairly satisfactory, if taken alone by itself. When taken in connection with the overstock from 1906, and the amount of merchandise and material on hand or in process at the beginning of the year, it shows very small profit.

Marketable goods and merchandise on hand at the end of the year 1907 were inventoried at \$2,000,000 less than cost, and concessions in prices to the amount of \$335,000 were made.

These items, in addition to the high rates and unusual amount of interest paid, made it necessary to pay substantially all of the dividend of 1907 out of surplus.

At the end of the year cash and cash assets exceeded the payables by about eighteen per cent. The quick assets including merchandise exceeded the payables more than two to one. The plant stands on the books at about \$12,000,000, which is fifty-one per cent. 682 of the actual cost.

During the year an issue of bonds to the amount of \$15,000,000 was authorized which will be used when conditions are favorable to provide additional working capital if needed.

A proposition was made by our company to purchase the outstanding share capital of the Western Electric Company at a price agreed upon with some representative shareholders as fair and equitable. Over 30,000 shares have accepted the offer, making the total holdings of our company over 120,000 out of 150,000 shares.

#### *Gross Revenue and Expenses—Operating Companies.*

Attention has been given to the operating expenses with a view to bringing them down to the lowest economy consistent with the highest efficiency.

In spite of increase in wages and the continuance of the same high standard of maintenance which has always prevailed, the ratio of expense to gross revenue has decreased so that the net revenue shows a gratifying improvement.

It is expected and believed that the continuation of the present policy through the coming year will produce equally satisfactory results.

The following table shows the year's results of all the telephone operating companies associated with the Bell system, not including the long-distance business and the Bell Telephone Company of Canada, for the year 1907, compared with 1906.

683 *Comparative Consolidated Statement of Bell Telephone Companies in United States. American Telephone and Telegraph Company Not Included.*

(Excluding Duplications.)

	1906.	1907.	Increase.
Gross Earnings .....	\$105,441,600.	\$120,753,200.	\$15,311,600.
Expenses:			
Operating and General	47,206,400.	53,242,300.	6,035,900.
Maintenance .....	30,639,200.	34,665,700.	4,026,500.
Total Expenses.	77,845,600.	87,908,000.	10,062,400.
Balance, Net Earnings	27,596,000.	32,845,200.	5,249,200.
Deduct Interest .....	5,197,800.	7,025,500.	1,827,700.
Balance .....	22,398,200.	25,819,700.	3,421,500.
Dividends Declared...	16,682,000.	19,206,100.	2,524,100.
Undivided Profits	5,716,200.	6,613,600.	897,400.

Issue of New Share Capital.

Early in the year, anticipating the possibility of an uncertain financial condition, your Directors authorized an offer of 219,252 shares of capital stock to the existing shareholders, at the ratio of one share to each six shares then held. Of this issue all but 9,486 shares were subscribed for and taken. The money realized placed our company in such condition that it was enabled to fully protect all of its associated and allied interests during the exceedingly critical financial period just passed, and left it in a position to meet

684 all anticipated demands of the current year based on a complete discussion of and agreement on the requirements and resources of our company, and of the associated and controlled companies.

With this issue there are now outstanding 1,525,280 shares of capital stock distributed among 23,469 shareholders, an increase of 5,275 over January 1, 1907, being an average of sixty-five shares each.

It will be interesting to note that 1,312,502 of these shares are held by 23,453 shareholders, an average of less than fifty-six each, the balance, 212,778, being held by sixteen shareholders of 5,000 or over shares each—an average of 13,298 each. More than three-quarters of the entire share capital is held in New England.

Selling Telephones.

The policy of our company in the past has been to lease telephones, and to allow the Western Electric Company to sell only apparatus

to our licensees. Believing that the best interests of all would be advanced by the general use of standard telephonic apparatus, after consultation with and with the approval of our associated and licensed companies, we authorized the Western Electric Company to sell both telephones and telephonic apparatus to all applicants. While the time has been too short to show positively the effect of this policy, the indications are that the benefits direct and indirect will be large, particularly in the development of unoccupied territory in connection with the Bell system.

#### 685 Exaggeration of Telephone Profits for Speculative Purposes.

Much of the agitation against legitimate telephone business is founded on false and exaggerated statements of the profits originally made by the early Bell companies.

These statements have been used by the promoters of both good and bad enterprises.

As a matter of fact, the shareholders of The American Bell Telephone Company and its predecessors paid into the treasuries of those companies more actual cash than was represented by the capitalization at par value.

The only shares of The American Bell Telephone Company not issued for cash at par or at a premium were the shares amounting to \$5,100,000 issued in exchange for the shares and property of the National Bell Telephone Company. The premiums received by the company on further issues of stock amounted to more than this sum.

The substitution of the American Telephone and Telegraph Company for The American Bell Telephone Company was, in effect, the purchase of the property of the American Bell Telephone Company for cash at somewhat less than the average market price prevailing prior to the purchase. None of the American Telephone and Telegraph shares now stand on any other basis than cash at par value.

In view of the enterprise shown and the risk incurred by the original investors, who received no interest or dividends for years,

the return was certainly not large to those who created an enterprise which has probably done more to bring about a new and advantageous condition in the affairs of mankind than any other industry in the history of the world.

#### Physical Valuation of Telephone Plants.

For the purpose of determining the relation between the physical plant and the capitalization, a valuation of the exchange, toll and long-distance line plant included in the Bell system was made at the close of the year. The valuation was based on the replacement cost of the existing plant, and does not include any "unearned increment" or allowance for franchises, but assumes a clear field and free franchise. When to this valuation is added the value of rights of way now unobtainable, patents, franchises, and other valuable considerations, it will be conceded that the Bell system is unique.



This showing is interesting and should serve to correct some popular but erroneous impressions.

January 1, 1908, all obligations of the American Telephone and Telegraph Company and its associated operating companies in the United States, including capital stock at par, held by the public were.....		\$554,939,000
Cash on hand, quick receivables, working assets, and sundry investments were .....		\$101,074,000
Balance, Capital representing plants.....		\$453,865,000
The plants are carried on the books of the various companies at.....		\$492,496,000
Appraised value by Engineers (copper at 15 cents)...		\$488,296,000
Outstanding obligations against plant.....		\$453,865,000
687	Appraised value in excess of outstanding obligations .....	\$34,431,000
Book value exchange construction only, per exchange station.....		\$114
Book value all plant (toll line and exchange) of Bell operating companies in United States (not including long-distance) per exchange station.....		\$149
Book value all plants in the United States, including long-distance, per exchange station.....		\$162

#### Promotion and Competition—Independent Companies.

The unusual production and prices, during the past few years, of those commodities which this country sells to the whole world, with accompanying very general distribution of wealth, resulted in an almost phenomenal financial and industrial activity, stimulating new enterprises and promotions of all kinds, among them independent telephone companies.

The exaggerated stories of the fortunes made by original telephone investors, together with misleading statements of probable profits, made it possible to launch many of these companies pledged to *low rates for exchange service and high dividends to investors*. At these low rates, with "maintenance" and "reconstruction" expenses either intentionally or ignorantly disregarded, these companies for a time had an appearance of prosperity.

The result has been unfortunate in nearly every case. The 688 promises and pledges as to rates and profits, made as an excuse for their coming, as a basis for their franchise, and as an incentive to attract capital, are now admitted to be impossible. Most, if not all, of these companies, which have had an existence long enough to force attention to the items of "maintenance" or "reconstruction," are now asking for increased rates, and to be absolved from onerous conditions freely accepted and assumed at the beginning. Reorganizations are now in progress.

It would seem, as a whole, that the gain of the public through

competition based on low rates has not compensated for the loss of capital invested in these enterprises.

During this period of strife and rush for development and extension, many subscribers were connected to exchange systems with little or no benefit to themselves or advantage to others, and much was done that under ordinary conditions would not have been done.

### Rates and Rate Regulation.

The result of these conditions has been to create in the minds of the public, and of public bodies, misleading and mistaken ideas of the telephone business. It has encouraged attempts at regulation of rates and business on lines that if obligatory or persisted in would be ruinous. In controversies as to rates, the policy of our associated companies has been to make a complete and absolute showing of the condition, cost and value of plant, cost and value of service, cost and necessity of proper maintenance, and the broad position is taken that neither our company nor the associated companies have anything to conceal or anything to apologize for. That the capitalization of all the companies is conservative, far within justifiable limits, and in the relation between the replacement value of the properties and the capitalization of the companies, unique. Fair rates, therefore, should be authorized or acquiesced in, for it is only by fair rates that good service to the public and permanent, healthy conditions can be created or maintained. With a full knowledge of all surrounding circumstances and conditions, it is believed that this would be fully acquiesced in by the public.

*Fair rates* would insure high-class plant and equipment maintained at a high rate of efficiency, and would provide fair wages to employees, the highest paid for similar class of employment. Both of these are necessary to good service.

*Fair rates* should give fair return on the investment, and promise fair return on new money needed. This is necessary to maintain the interest of the existing shareholders in the proper administration of the business, as well as to provide for the continually increasing public demand.

Any revenue produced over and above such requirements and the proper reserve to provide for contingencies could be used for the benefit of the public, allowing the company to retain a part sufficient to stimulate the most efficient and economical management. It would be difficult, if not impossible, to get effective and economical management, such as would produce the best results for both the public and the shareholders, without recognizing this principle.

690 It does not seem possible that there can be any question of the justice of this position. That being granted, the facts to be settled are:—

Is the management honest and competent?

What is the investment?

Is the property represented by that investment maintained at a high standard?

What percentage of return does it show?

Is that a fair return?

Is it obtained by a reasonable distribution of gross charges?

If these questions are answered satisfactorily, there can be no basis for conflict between the company and the public, and the less the working conditions are made inflexible by legislative proscription, the better will be the solution of the constantly changing problems incident to a growing business.

The question of maintenance is of the greatest importance and will be referred to more at length later.

### Competition.

The value of any exchange system is measured by the number of the members of any community that are connected with it. If there are two systems, neither of them serving all, important users must be connected with both systems. Connection with only one is of but partial value and cannot be satisfactory. Two exchange systems in the same community, each serving the same members, cannot be conceived of as a permanency, nor can the service in either be furnished at any material reduction because of the competition, if return on investment and proper maintenance are taken into account. Duplication of plant is a waste to the investor. Duplication of charges is a waste to the user.

The advantages claimed for competition are lower rates and improved service. Exhaustive competition may temporarily produce either or both of these results, but, as before stated, this temporary gain is purchased by an excessive waste. Duplication of plant and operation cannot produce either result without exhaustive competition. Given the same management, the public must pay double rates for service, to meet double charges, on double capital, double operating expenses and double maintenance. In most cases of proposed competition an examination of the prospectus will show that, by some process, it is expected to make good a capitalization equal to at least two or three times the actual cost of the construction. The only benefits are to the promoter.

### Public Control.

It is contended that if there is to be no competition, there should be public control.

It is not believed that there is any serious objection to such control, provided it is independent, intelligent, considerate, thorough and just, recognizing, as does the Interstate Commerce Commission in its report recently issued, that capital is entitled to its fair return, and good management or enterprise to its reward.

### What is Fair Return on Capital?

With guaranteed or reasonably certain income, money can be obtained for any enterprise at moderate rates.

692 With uncertainty—owing to competition and opposition, possible or actual, or possible regulation of rates without proper investigation or consideration—a more or less speculative price must be paid.

Subject to these general rules, "locality" and existing general conditions will establish the rate.

### Fair Charges. Upon What Based. Exchange Service.

An exchange system is made up of circuits (each consisting of two wires) radiating from a central office, or from central offices connected by trunk lines, so arranged that each circuit can be connected directly or through trunk lines with the others. There are in these circuits of the Bell system about 7,000,000 miles of wire—over two miles of wire to each subscriber—one-half in underground conduits. The system of radiating circuits is the most expensive part of the exchange system to build, it is least durable, therefore most expensive to maintain, calls for the largest part of the total investment, and consequently must bear the largest part of the cost of capital.

The real value of a telephone exchange system depends entirely on the distribution and number of other members of the same or other communities connected with the same or connecting systems, with whom any subscriber can have prompt and satisfactory communication.

Any member of a community connected with an exchange system can be reached as well, but not as conveniently, from a central or public office as from a subscriber's station.

To reach any member of a community not connected with any exchange system, whether from public station or subscriber's station, is too inconvenient and impractical to be considered  
693 for ordinary use.

Therefore, the particular circuit connecting any subscriber with the exchange is what might be termed a *convenience to that particular subscriber, but a necessity to all other subscribers.*

It is not merely the maintenance of the individual circuit connecting with the exchange that is paid for by any subscriber; *it is in a greater measure the use from time to time of the circuits, trunks and facilities which make communication possible with all other subscribers.*

It is the ability to communicate with others that makes the exchange valuable; it is the use of other circuits than your own.

The cost and value of the system to any subscriber do not depend so much on the number of communications had as on the number and extent of other circuits and facilities necessary to give the communications desired.

It is plain, therefore, that the character of the circuit connecting any subscriber with the exchange does not determine either the cost or value to that subscriber of the exchange connections.

The many and complicated systems of charges prevailing indicate the struggles experts have had in their efforts to establish consistent and reasonable rates.

As the value of the exchange to the subscriber depends upon the number of subscribers within reach—rates must be so established that the maximum number of subscribers can be obtained, so that the greatest number of those with whom communication may be wanted will be connected with the exchange. The cost of any  
 694 circuit, therefore, must be largely distributed between those who may desire to communicate with the particular subscriber connected by that circuit.

The cost or value cannot be exactly distributed — an approximation is reached by measured service charges, or by a classification of service between business houses and residences with a sub-classification of plant between "direct" and "party" line.

Business rates are higher for the reason that presumably the business subscriber connects with the greatest number of other subscribers, and consequently makes use of the greatest number of circuits and operating facilities in an exchange.

Residence rates are lower because the residence subscriber connects with a limited number of other subscribers, and because he makes more limited demands on the central office.

It being established that the measure of value is not in the particular class of line connecting any subscriber to an exchange, but in the use of the exchange system as a whole, and that the value of any exchange depends on the area covered and the maximum number of desired individuals that can be reached, rates must be so adjusted that no rate shall bear unjustly on particular individuals or classes; that, at some rate, connection with the exchange is within reach of anyone who can add to the value, to others, of the exchange, and that, as a whole, the revenue will be sufficient to maintain the plant, pay fair wages, make enough return on capital and enterprise to insure good economical management and sufficient capital to meet the increasing demands of the public.

695

#### "Toll" Line and "Long-Distance" Service.

Toll line and long-distance communications require, as in exchange connections, the exclusive use of a circuit, two wires, between two points for an interval of time, varying with the conditions; over the whole system the average "time interval" consumed in the completion of each communication is about seven and one-half minutes.

Direct service between two points with large demands for service is the least complicated; the average "time interval" of each communication lasts about three and one-half to five minutes. Between points of small demand, or between intermediate points on local lines, both complications and cost increase, and the average "time interval" is not less than five minutes each. Between points on side or branch lines, or distant points requiring combinations of circuits, or complicated and delicate auxiliary apparatus with many attendant operators, complications and cost increase rapidly, and the "time interval" taken for each communication varies from five or seven and one-half minutes to an indefinite period.

*Cost is determined by the capital and maintenance charges of the*

*plant and operating costs, divided by the average number of communications.*

Cheap rates for service depend upon high average use of facilities.

High average is obtained ordinarily in public service by putting on higher pressure—crowding—or in some way rendering more than normal service through or over any given facilities during the limited period of great demand.

It is by this means, and by this means only, that cheap service is rendered to the public.

Whatever inconvenience or discomfort there may be caused on one hand is compensated for by the reduced price charged for service.

In this particular, toll line or long-distance service is unique. In whatever way the circuit is made up, a certain "time interval" must be given exclusively to each communication, and to the communicating parties. No other communication can be crowded on that circuit during that "time interval."

Any "time interval" passed without being utilized is lost beyond recovery. A good average cannot be made by crowding two or more communications into the "time interval" of one, nor by putting on higher pressure to get more "time intervals" over the same circuit.

There are only a certain number of five-minute "time intervals" in each hour, or five-minute "spaces" on each clock. If you want more "time intervals" or more "spaces," you must take more hours or more clocks. In toll line business anything above the normal capacity of each circuit must be provided for by additional circuits.

Toll line or long-distance business requires the presence of the communicating parties; for that reason it is confined to the business or working hours of the day; and further, the greater part of this business is not only limited to those few hours when parties are most likely to be located at some particular place, but to that part of those few hours immediately after the general business of the day has developed. For this reason the greater part of the toll line or long-distance business is crowded into an exceedingly small part of the business day. The periods of great demand are short. The facilities provided are idle a great part of even the business hours.

The diagrams following illustrate this most graphically—one taken at Washington, where the business hours, due to the newspaper correspondence, extend well into the night, the other at a city which shows better than the average.

Examination shows that about half the facilities are utilized to a fair part of the capacity during business hours only. All the rest are utilized only to a fractional part of the capacity at any time. If during certain hours the business as shown on these diagrams could be subjected to a half hour's delay, the facilities required could be reduced one-third at least.

Toll line or long-distance business is in the minds of the public similar to telegraphic message business. There is no comparison. Telegraphic circuits between points are at most one wire, on all trunk lines two to four circuits over one wire.

Telegrams are handed in, filed before an operator and despatched



in order. In this way the business is distributed more uniformly over working hours, and during the night hours the lines are used for press messages, night messages, or for long-distance messages in transit.

#### Maintenance.

Utter disregard for repairs and reconstruction, usually comprised under the head of "maintenance," has been the cause of more  
698 misunderstanding on the part of the public and public bodies having to do with rates, of more self—or selfish—deceit on the part of promoters of telephone enterprises, and of more mistakes on the part of the investing public than any one factor in the telephone business.

With a new plant, "current repair" is at a minimum, and can be for a time disregarded; with a growing plant, it is too easy to lose it in construction; but sooner or later, if not provided out of current revenue, where it belongs, it will be found either in increased construction—that is, capital charges—or in a depreciated plant.

Any company paying dividends and fixed charges, particularly dividends, without first providing for proper maintenance, can have but one end—disaster.

In any consideration of this question the leaning should be towards liberal rather than inadequate maintenance. In any properly administered company any excess would be found in betterments or construction, and consequently in reduced capital investment, while inadequate maintenance would soon show in quality of service and in reconstruction requirements. In other words, surplus maintenance would be offset by decrease of capital charges, while inadequate maintenance requiring new construction in time would increase capital charges.

Attention is called to the facts shown above that during the past five years there has been expended out of revenue for maintenance and reconstruction about \$150,000.000 on plant, which now has a replacement value of \$488,000.000.

#### 699 Comparative Statistics and Statements.

Appended hereto, as usual, are a series of comparative statistics showing certain phases of the development of the business of the company and its associated companies; the balance sheet of the company as of January 1, 1908; also a comparative statement of the earnings and expenses for the years 1906 and 1907, and a statement showing the net revenue and the dividends paid 1900-1907.

In connection with the improvement shown in the year's business, it may not be amiss to call attention to the fact that each year in the past has shown an improvement over the previous year, whatever may have been the general business conditions.

Everything indicates that the current year will be no exception to this.

It is only in times like the present that the true economy and value of the telephone service with its varied relations to the dispatch and conduct of business and to social relations can be realized.



This only emphasizes the fact that of all services the telephone service is the last to be dispensed with.

### General.

The past year completes what may be called the thirtieth year of corporate organized work in the development of the Bell Telephone System. In the mind of Mr. Bell, the invention and its application had simultaneous growth. During the first year, such of the many "imaginings" and ideas as to development as were demonstrably practical were assimilated and the business was established on the lines now followed which make our company with its associated companies a national system with millions of subscribers connected by millions of miles of circuit with local exchange systems, all bound into one large comprehensive system by the toll and long-distance lines with their 163,000 miles of poles and 1,664,000 miles of wire, the whole inter-dependent and inter-communicating, an aggregation or union impossible to destroy in detail, and impossible to reproduce as a whole.

Each year has seen some progress in annihilating distance and bringing people closer to each other. Thirty years more may bring about results which will be almost as astonishing as those of the past thirty years. To the public, this "Bell System" furnishes facilities, in its "universality" of service and connection, of infinite value to the business world, a service which could not be furnished disassociated companies.

The strength of the Bell system lies in this "universality." It affords facilities to the public beyond those possible on any other lines. It carries with it also the obligation to occupy and develop the whole field. The urban field was the first to receive attention and the development keeps pace with the demand. The semi-urban and rural demand came later. This has been met both directly by the operating companies and indirectly through local, co-operative and rural combinations, under license from, and connected by toll lines with, our operating companies. The policy adopted during the year, of selling telephones and telephonic apparatus, has given fresh impetus to this line of development, which is now showing most gratifying results.

This position of our company has been reached only by a large expenditure of capital, which is, however, fully represented by plant and property with an earning power that must be considered satisfactory.

If this expenditure is but considered as the financing of thirty-five distinct companies occupying thirty-five distinct territories and is considered as so distributed, rather than as a whole, the aggregate does not seem formidable. In this focussing of capital there are distinct advantages in that the revenue is derived from so many and such varied sources, and that the success of our company lies not in the success of any one company but in the average of all.

For the Directors,

THEODORE N. VAIL, *President.*

\* \* \* \* \*

702 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Not to be reported.

No. 628. In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH Co.,

vs.

CITY OF MEMPHIS.

*Opinion.*

Filed June 11th, 1908, Dan F. Elliotte, Clerk.

Assuming that the City of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis, this general power must nevertheless be exercised in such manner as not to violate the constitutional rights of the complainant. The rates which the city may fix must be reasonable and fair and not confiscatory. I do not understand this proposition to be controverted. The question now is not whether the rates charged by the complainant are too high, but whether the very different rates fixed by the ordinances are so low as, practically to take the complainant's property away from it and appropriate it to the use of the people of the city. The law in the premises as settled by the Supreme Court of the United States is well and accurately summarized in Beale and Wyman's late work on Railroad Rate Regulation in this language:

SEC. 312. The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair, return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses; which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled

703 furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same."

While in terms this language refers to railroad rates, it is not possible that any different rule can grow out of the fact that the ordinance in this case refers to telephone rates only.

The holders of stock in the complainant company are entitled to a fair return upon their investment if the company can earn it, but the testimony leaves no doubt that the rates prescribed by the ordinance would leave practically nothing to the stockholders. Under

its operation they would lose, as the testimony shows, even the 2, 3 or at best 4 per cent. per annum profit on \$1,125,000 which has been earned in late years. If to large taxation and other enforced expenditures already properly exacted, the city (now that complainant's plant is fully installed) can add the burden of rates fixed arbitrarily that would so diminish earnings (though not expenses) as to leave no dividends whatever for stockholders, manifestly the money invested by them would be used for the benefit alone of the people of Memphis and not at all for the profit of those who made the investment under inducements offered by the city.

The Governor of one of our greatest States recently vetoed a proposed rate bill upon the ground that no real effort had been made to ascertain with accuracy those factors of exact information, etc., upon which alone such legislation could fairly and justly rest. This we believe was good reason for executive action. In this instance the City of Memphis not only did not investigate the facts as they existed at home before enacting the ordinance (though indeed that would not of itself affect its validity), but has not done so under the

704 spur of this litigation.

It may have been that this latter course was pursued because there was no hope of overcoming the force of complainant's testimony which was taken early and promptly. At all events that testimony is practically uncontradicted, so far as it directly bears upon the controversy. Presumably the same information would have been obtained if investigation had been made before the ordinance was enacted. True there was an open meeting held by the committee of the Legislative Council, at which there were arguments, and the committee seems to have gathered statistics as to telephones in other cities throughout the country, but apparently there was no effort to get precise and detailed information as to the exact status at Memphis—the one place about which it was essential to learn. The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may, in large measure, be local questions to be determined upon factors among which the most important may be, 1st, the cost of the plant; 2nd, the cost of operation and maintenance; 3rd, the amount of taxes and other dues exacted by the local government, and 4th, the rapidity of deterioration due to climatic or other causes. If these be among the controlling factors, no one of them seems to have been considered in any detail by the city. But whether or not any or all of them were considered in preparing the ordinance, the testimony shows that the result of operating in Memphis under it is certain. That result seems to us to be destructive of the complainant's rights under the Constitution of the United States.

In Judge Clark's opinion upon the motion for the temporary injunction it is clearly indicated that that learned and lamented Judge thought that the city had no power or authority to enact the ordinance for two reasons, viz: 1st, because the State had never given the city such authority, and, 2nd, because the city had a contract with the complainant which could not be thus impaired.

705 We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, nor inclination to do so, because we are entirely content to decide the case on final hearing upon the one ground herein discussed.

It seems to us, upon a careful consideration of the testimony, that the temporary injunction should be made perpetual.

A final decree giving that relief and the costs of this proceeding may be prepared.

WALTER EVANS, *Judge*.

June 11, 1908.

706

LL.

UNITED STATES OF AMERICA,

*Western Division of the Western District of Tennessee:*

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a Regular Term Thereof Begun and Held for its May Term, A. D. 1908, at the United States Court House in the City of Memphis, in said District, on to-wit, the 12th day of June, A. D. 1908, in the following cause, to-wit:

No. 628. In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

CITY OF MEMPHIS et al.

Be it Remembered that this Cause coming on to be heard before the Honorable Walter Evans, Judge, etc., in the City of Louisville, Ky., on this the 10th Day of June, 1908:

1. Upon the application of the defendants to continue the case for the further taking of evidence upon the question of the reasonableness of rates provided for in the ordinance, which application is overruled and disallowed:

2. All exceptions to the competency and relevancy of evidence on either side are overruled and disallowed.

3. Thereupon the cause was finally heard upon the bill, answer and other pleadings, and upon the testimony and the entire record, and the Court being advised, delivered an opinion in writing and pursuant thereto considers that the ordinance of the City of Memphis, adopted September 24th, 1907, undertaking to prescribe rates for telephone service in the City of Memphis is in violation of the Fourteenth Amendment to the Constitution of the United States, and is null and void:

707

It is ordered, adjudged and decreed by the Court that the preliminary injunction heretofore granted is made perpetual, and the City

of Memphis and all other persons are hereby perpetually restrained and enjoined from attempting to enforce said ordinance against the plaintiff in this case.

It is further ordered, adjudged and decreed by the Court that the plaintiff, the Cumberland Telephone and Telegraph Company, recover of the defendant, the City of Memphis, the entire costs of this proceedings, for which execution is awarded.

Enter June 11, 1908.

708

MM.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAMES H. MALONE, and GEORGE T. O'HAYER.

*Petition for an Appeal.*

Filed June 16th, 1908. Dan F. Elliotte, Clerk.

The above named respondents, the City of Memphis, Jas. H. Malone and Geo. T. O'Haver, conceiving themselves aggrieved by the order and final decree made and entered on the 12th day of June A. D. 1908, in the above entitled cause, wherein and whereby it is ordered, adjudged and decreed that the ordinance of the City of Memphis set out in complainant's bill, fixing rates to be charged by telephone companies operating in said City, is in violation of the Fourteenth Amendment to the Constitution of the United States, and is illegal and void, and decreeing and making perpetual the temporary injunction heretofore granted and issued against respondents herein, and adjudging the costs against respondents and awarding execution therefor, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons assigned in the Assignment of Errors which is filed herewith, and they pray that this appeal may be allowed and a transcript of the record, the proceedings and the papers upon which said orders and decrees were made, duly authenticated may be sent to the Supreme Court of the United States as required by law.

709

THOS. H. JACKSON,

J. L. McREE,

MARION G. EVANS,

*Solicitors for Respondents.*

The foregoing petition and claim for appeal is allowed upon respondents executing bond in the sum of One Thousand dollars (\$1000) conditioned as the law directs, which bond has been exe-

cuted, and which bond has been approved by me as Judge, and is filed along with this order.

WALTER EVANS, *Judge.*

710

NN.

In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS, JAS. H. MALONE, Mayor, and GEO. T.  
O'HAYER, Chief of Police.

*Assignment of Errors.*

Filed June 16th, 1908. Dan F. Elliotte, Clerk.

Comes now the respondents and file the following assignment of errors upon which they will rely upon their appeal from the final decree made by this Honorable Court and entered on the 12th day of June, 1908, in the above entitled cause:

I.

That the said United States Circuit Court erred *on* denying and overruling respondents' application for a continuance and *and* for further time to take proof in said cause, both in its order entered on the 27th day of May, 1908, and in its decree entered on the 12th day of June, 1908.

II.

That the said Court erred in adju-ging and decreeing the ordinance of the City of Memphis involved in this cause and set out in complainant's bill, to be in violation of the fourteenth amendment to the Constitution of the United States and illegal and void; and adjudging the costs against the respondents.

711

III.

That the said Court erred in awarding, and ordering a permanent injunction restraining respondents from enforcing the aforesaid ordinance and the telephone rates provided therein.

IV.

That the Court erred in entering any decree against respondents upon the pleadings in said cause and the facts stated therein.

## V.

That the court erred in refusing to dismiss complainant's bill, and to dissolve the injunction.

THOS. H. JACKSON,  
MARION G. EVANS,  
JAS. L. McREE,

*Solicitors for Respondents, City of Memphis,  
Jas. H. Malone, and Geo. T. O'Haver.*

712

OO.

UNITED STATES OF AMERICA.

*Western Division of the Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a Regular Term Thereof begun and Held for its May Term A. D. 1908, at the United States Court House in the City of Memphis, in said District, on, to-wit, the 23rd day of June A. D. 1908, in the following cause, to-wit:

No. 628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF MEMPHIS et al.

*Order Granting Petition for Appeal.*

This day came the Respondents, by their solicitors of record herein, and files in this cause *its* petition for an appeal from the final decree rendered and entered hereon on the 12th day of June A. D. 1908, to the Supreme Court of the United States, and for satisfactory reasons to the Court appearing, the prayer is hereby allowed upon the said appellant- filing herein *its* appeal bond in the penal sum of one thousand (\$1,000.00) Dollars as required by law, said appellant having this day filed *its* assignments of error as prescribed by law and the rules of said Supreme Court of the United States.



In the Circuit Court of the United States for the Western Division  
of the Western District of Tennessee.

No. 628. In Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO.

vs.

THE CITY OF MEMPHIS, JAS. H. MALONE, and GEORGE T. O'Haver.

*Bond on Appeal.*

Filed June 23rd, 1908. Dan F. Elliotte, Clerk.

Know all men by these presents, that we, the City of Memphis, Jas. H. Malone, and Geo. T. O'Haver, as principals and Geo. C. Love as surety, are held and firmly bound unto the Cumberland Telephone & Telegraph Company in the full and just sum of One Thousand (\$1000.00) Dollars, to be paid to the said Telephone & Telegraph Company certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 16th day of June 1908.

Whereas, lately at our Circuit Court of the United States for the Western Division of the Western District of Tennessee, in a suit depending in said Court between the Cumberland Telephone & Telegraph Company as complainant, and the City of Memphis, Jas. H. Malone and Geo. T. O'Haver as respondents, wherein a final decree was rendered against the said City of Memphis, Jas. H. Malone, and Geo. T. O'Haver, — the said City of Memphis, Jas. H. Malone, and Geo. T. O'Haver having obtained an appeal from said decree and the injunction granted therein and filed a copy thereof in the

714 Clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Cumberland Telephone & Telegraph Company citing and admonishing it to be and appear before the Supreme Court of the United States, to be holden at the City of Washington in the District of Columbia, on the second Monday in October A. D. 1908.

Now, the condition of the above obligation is such, that if the said City of Memphis, Jas. H. Malone and Geo. T. O'Haver, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF MEMPHIS,  
JAMES H. MALONE,  
GEO. T. O'HAYER,  
By M. G. EVANS, Att'y.  
GEO. C. LOVE, Surety.

Sealed and delivered in the presence of:  
CHAS. F. FRANK.

Approved by:  
WALTER EVANS, Judge.

715

QQ.

628. Equity.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY  
vs.  
THE CITY OF MEMPHIS.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Cumberland Telephone & Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States in the City of Washington, in the District of Columbia, within thirty days, pursuant to an Appeal filed in the Clerk's office of the Circuit Court of the United States for the Western District of Tennessee, in a certain case numbered 628 in Equity, wherein the City of Memphis and others are respondents and appellants and you are complainant and appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this the 23rd day of June, A. D. 1908, and of the Independence of the United States the 132nd year.

WALTER EVANS, Judge.

Service of the within citation and receipt of copy thereof admitted and accepted this 26th day of June, A. D. 1908.

WM. L. GRANBERY &  
E. E. WRIGHT,

*Attorneys for the Cumberland Telephone —  
Telegraph Company, Appellee.*

[Endorsed:] Circuit Court of the United States, Western District of Tennessee.

716 THE UNITED STATES OF AMERICA,  
*Sixth Judicial Circuit, Western District of Tennessee:*

I, Dan F. Elliott, Clerk of the Circuit Court of the United States, for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the originals, made in pursuance to stipulations of counsel, including the original citation, in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit: No. 628, Equity. The Cumberland Telephone & Telegraph Company vs. The City of Memphis, James H. Malone, Mayor, and George T. O'Haver, Chief of Police.

In testimony whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in the City of Memphis,

Tennessee, this 20th day of July A. D. 1908 and of the Independence of the United States the 133rd Year.

DAN F. ELLIOTTE, *Clerk.*

*Authentication.*

I, Jno. E. McCall, a Judge of said Court, do hereby certify that Dan F. Elliotte, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, Clerk of said Court, and that his attestation is in due form.

JNO. E. McCALL,  
*Judge of the District Courts of the United States  
for the District Aforesaid.*

Endorsed on cover: File No. 21,279. W. Tennessee C. C. U. S. Term No. 215. The City of Memphis, James H. Malone, and George T. O'Haver, appellants, vs. The Cumberland Telephone & Telegraph Company. Filed July 30th, 1908. File No. 21,279.

IN THE  
Supreme Court of the United  
States

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CITY OF MEMPHIS, ET AL.,

vs.

No. 215.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

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**STATEMENT OF FACTS.**

This is a suit brought originally in the Circuit Court of the United States for the Western Division of the Western District of Tennessee by the Cumberland Telephone & Telegraph Company. The object of the complainant was to secure an injunction against the City of Memphis, to prevent it from putting into operation the provisions of the following ordinance regulating the rates to be charged by the complainant for telephone service in the city of Memphis:

“An ordinance to regulate charges of telephone companies in the city of Memphis:

Section 1. Be it ordained by the Legislative Council of the City of Memphis, That all telephone companies operating a system of telephones in the city of Memphis shall charge for each telephone in places used for business purposes not exceeding \$5.00 per calendar month, and for each telephone in private residences not exceeding \$2.50 per calendar month. And every subscriber for either a business or residence telephone shall have the right to pay for the same monthly in advance, in accordance with the above rates. And such telephone company shall have the right to charge an increased rate of 50 cents per month to all subscribers who remain in default after the 10th of each month, provided this ordinance does not apply to telephone companies whose rates are fixed by contract with the City of Memphis.

Sec. 2. Be it further ordained, That any such telephone company that shall charge more for the use of its telephones than the respective amounts above set out, shall

be guilty of a misdemeanor, punishable by a fine of \$10.00 for each offense. And each day that any such telephone is operated by any telephone company at a rate in excess of that set out, shall constitute a separate offense under this ordinance.

Sec. 3. Be it further ordained, That any telephone company operating a telephone system in the city of Memphis which, after being tendered the rates above set out in this ordinance, shall refuse to operate telephones for those who demand same, shall be guilty of a misdemeanor, punishable by a fine of \$10 for each offense. And each day such telephone company continues its refusal to operate any telephone after such tender and demand, shall constitute a separate offense under the ordinance.

Sec. 4. Be it further ordained, That this ordinance take effect from and after its passage, the public welfare requiring it." Record p. 60.

This ordinance was passed September 24th, 1907, and the complainant made no effort to comply with the terms of the ordinance, but filed its bill for an injunction upon October 2d, 1907.

The grounds upon which relief was sought were that the ordinance was invalid, first, because the City of Memphis did not possess any power to regulate the rates of the defendant, such authority not having been given it by the State Legislature.

Second: That the City of Memphis, if ever possessed of such power, had, by a contract with the complainant, granted away its right to regulate rates after the local exchange attained a certain size, and that it had attained such size.

Third: That the rates prescribed by the ordinance were so unreasonably low that the Company could not operate thereunder with any profit, and that said rates were consequently a taking of private property for public purposes without due compensation or due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

Record pp. 2 to 14.

The City of Memphis filed an answer on October 12th, 1907, denying all of the important allegations of the complainant's bill.

It was further insisted by the City of Memphis that it not only had the right to regulate telephone rates by virtue of its general charter powers and certain special grants from the Legislature, but that the telephone company was a trespasser upon the city streets, removable at the will and pleasure of the City Council, and that the council could, therefore, prescribe the terms upon which the city streets could be occupied. Thus the city was under no obligation to prescribe any rates save such as it saw fit, but it was alleged that the rates prescribed were, in fact, thoroughly reasonable and not confiscatory.

It was also denied that the city had, by contract, parted with any of its powers to regulate rates.

See Ans. of Defendant, Record 68, 69, 70, 71.

Certain affidavits were filed by the Cumberland Company, and upon these and the bill and answer, the case came on for hearing, and a preliminary injunction was granted.

Record p. 75.

The trial judge held that the city was estopped by the contract which complainant claimed existed, and also that the rates were unreasonable.

Record p. 76.

Both sides thereupon proceeded to take proof, and the case came on for final hearing on June 11th, 1908, before Judge Evans, at Louisville, Ky., the judge of the Circuit Court at Memphis being incapacitated to act because he was a stockholder in the company.

The final decree was based wholly upon the theory that the rates prescribed by the city ordinance were such that the ordinance must be considered in violation of the Fourteenth Amendment of the Constitution of the United States.

Record pp. 407-8.

The case thus turning exclusively upon a constitutional question, an appeal was prayed and granted on June 16th, 1908, proper errors assigned, and the case brought to this Honorable Court.

Record pp. 409-410.

The following facts in the record appear to be undisputed: The complainant company is a Kentucky corporation, its

original charter having been obtained in 1882 by virtue of a general act of the Kentucky Legislature.

Record pp. 16-17.

This charter has been modified from time to time, other companies being absorbed, and the capital stock increased, until at the time of the institution of the present suit the corporation had an authorized capitalization of \$20,000,000, divided into shares of \$100 each.

Record p. 54.

The last amendment of the charter shown is dated February 9th, 1903, and there is no testimony of any character to explain how the company was enabled to issue more capital stock than its charter authorized. The president of the company declares, however, that the outstanding stock is \$20,174,450, and it is upon this amount that all of the company's calculations are based.

Record p. 94.

There was considerable evidence taken to show that the complainant was entitled to use the streets of Memphis, and was not a bare trespasser, who could be ejected at will. As to the character or sufficiency of this proof, we need not here inquire, as it has since been definitely settled.

At the time this suit was brought the City of Memphis was claiming the right to exact from the Cumberland Telephone & Telegraph Company a pole rental for each pole set in the city streets. This was upon the theory that the company, having no authority to use the streets, could be compelled to pay a reasonable charge for their occupation. While the present suit, however, has been pending, the Supreme Court of the State of Tennessee has decided, at its April term, 1909, that the Cumberland Company was not a trespasser upon the streets of Memphis, but had a right to occupy the highways with its poles and wires.

In a memorandum opinion, not yet published, the Court held that the company was entitled to use the streets by virtue of an estoppel against the city created by the use of the top cross arms by the city and the other concessions which it had received under the Carnes permit.

The Court expressly pretermitted the questions whether the right of the company to use the streets was perpetual, and whether the company had a permanent contract, basing its opinion upon the fact that the city could not impose addi-



tional burdens as long as it claimed the benefits of the existing arrangement with the company.

As the opinion of the lower court sets out the history of the parties in detail, and has been affirmed by the higher court, we herewith copy it in full.

“This cause came on to be heard on this, the 30th day of March, 1908, before the Honorable F. H. Heiskell, Chancellor, upon the bill of complaint, the answer of the defendant, the evidence, the written stipulations of counsel and the arguments of counsel, and upon consideration of all which it appears to the Court that, on the 14th day of December, 1879, Samuel T. Carnes filed his written petition before the Legislative Council of the Taxing District of Shelby County, Tennessee, now the complainant, the City of Memphis, in which he stated that he desired and proposed establishing a telephone exchange in said Taxing District, and as a consideration for such right offered to give the said Taxing District the right to the exclusive use of the top cross arms of each and all the poles it planted for its fire alarm system, and in addition to give said Taxing District half rates for such telephones as it might desire to use, which petition was on the 15th day of December, 1879, granted by the Legislative Council of said Taxing District, on condition that no poles should be planted by said Carnes without first obtaining a permit for so doing from the proper municipal authorities, and that such grant should not constitute a monopoly; that the said Carnes, in pursuance of such grant, immediately proceeded to construct said exchange, planting his poles and stringing his wires in the streets and alleys of the Taxing District, and operated said exchange until some time in the year 1881, when he assigned and transferred the same, and all of his rights therein, to the Memphis Telephone & Electric Company, a corporation chartered under the laws of the State of Tennessee; and that the said company continuously thereafter operated said exchange until the year 1883, when it assigned all of its property and rights therein to the defendant, the Cumberland Telephone & Telegraph Company, which company from that time has continuously operated and is now engaged in operating said exchange in said city.

And it further appearing to the Court that, from the time of said grant to said Carnes to the present, all of the poles erected either by said Carnes, the Memphis Telephone & Electric Company, or the defendant, the

Cumberland Telephone & Telegraph Company, were erected by formal permission given by the proper municipal authorities of the Taxing District of the City of Memphis, and under the supervision of its proper officials.

And it further appearing that said Taxing District, as fast as said Carnes planted his poles in its streets and alleys, occupied the top cross arm of said poles with its fire alarm system, and that as additional poles were from time to time planted by the Memphis Telephone & Electric Company, and by the defendant, the Cumberland Telephone & Telegraph Company, the said Taxing District, or City of Memphis, likewise occupied the top cross arm of such new and additional poles with its fire alarm system, and many years ago added as an additional burden thereon what is known as its police signal system, with the full consent of the defendant, and still continues to so occupy the top cross arms of said poles with its said systems; that the said Taxing District from the beginning of the operation of said telephone exchange by said Carnes took and received, as agreed on with him, a number of telephones at the reduced rates prescribed by said agreement, and thereafter continued to receive, from the time the defendant, the Cumberland Telephone & Telegraph Company, became the owner of said exchange, the telephones without charge or cost to it, and still continues so to do; and that the defendant, the Cumberland Telephone & Telegraph Company, and its predecessors in title, the Memphis Telephone & Electric Company, and S. T. Carnes, have, in all instances, planted their poles in the streets and alleys of said Taxing District and the City of Memphis in pursuance of permits issued by the proper municipal authorities to that end, and have in all respects lived up to their contract obligation with said Taxing District and City of Memphis. And it further appearing that said Carnes and his successors in title, the Memphis Telephone & Electric Company and the Cumberland Telephone & Telegraph Company, upon the faith of said agreement with the Taxing District and its successor, the City of Memphis, having expended about \$1,100,000.00 in the construction and extension of said telephone exchange, and upon the faith of their right to do so by reason of the promises, the major portion of which has been expended by the defendant, the Cumberland Telephone & Telegraph Company, with the full knowledge and without objection of the complainant, the City of Memphis.

And it further appearing that the City of Memphis has never repudiated said agreement or offered to reimburse the defendant, the Cumberland Telephone & Telegraph Company, for the benefits and advantages which it has received thereunder, but continues to claim and hold the same.

It is therefore considered by the Court that the defendant, the Cumberland Telephone & Telegraph Company, by reason of said Carnes grant, the act of the Legislature of the State of Tennessee, Chapter 66 of the Sessions of 1885, and the facts hereinabove set forth, has long since acquired an easement and right of way for its poles and wires in the streets and alleys of the complainant, the City of Memphis, and that the complainant, the City of Memphis, is estopped to impose other or additional burdens upon the defendant than those agreed on as above set forth; that especially complainant cannot by ordinance charge the defendant, the Cumberland Telephone & Telegraph Company, rental for poles so planted by it in the alleys and streets of said city; and that, therefore, the ordinance of the Legislative Council of said city, enacted on December 20th, 1894, and amended by the ordinance of the 25th day of February, 1902, which are made exhibits to the bill of complaint herein, insofar as they, or either of them, seek to impose a rental of \$2.00 or \$3.00, or any other sum, per pole per annum upon the defendant, the Cumberland Telephone & Telegraph Company, are null and void.

It is therefore ordered, adjudged and decreed by the Court that the bill of complaint is without merit or equity, and the same is accordingly dismissed, and that the complainant, the City of Memphis, pay all the costs of this case, for which let execution issue."

It is by virtue of the contract entered into between the City of Memphis and Gen. S. T. Carnes that the Cumberland Telephone & Telegraph Company now does business in the City of Memphis. It appears that the entire plant of the Memphis Telephone & Electric Company, the assignee of S. T. Carnes, was purchased by the Cumberland Telephone & Telegraph Company in 1883, and that the complainant herein has operated a telephone exchange in Memphis ever since that date.

The corporate and municipal character of the defendant, the passage of the ordinance complained of in due form, and the effort of the City of Memphis to enforce it, are alleged on the

one hand and admitted on the other. When we dispose of these elemental facts we have abandoned the field in which any evidence is accepted without any dispute or contest.

In order to understand the many conflicting theories and claims, it is therefore necessary to set out the respective contentions of the parties, and the proof introduced to sustain them.

We shall first consider the evidence and pleadings of the complainant. The main contention of the bill was that the rates prescribed by the city ordinance would compel the company to operate its exchange at a loss, and that the rates were, therefore, so low as to be confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States.

In order to sustain this contention, the complainant relied exclusively upon the testimony of three of its own employes and certain tables, which were introduced by these employes, as exhibits to their depositions. There is no outside testimony and, indeed, the source of a good deal of the information upon which these witnesses based their conclusions is not disclosed to the Court.

The first witness for the complainant was Mr. James E. Caldwell, its president and general manager. He testified that he has been familiar and conversant with the affairs of the complainant company since 1885, at which time he became connected with it. (Record p. 84.) He was not familiar with the terms of the purchase of the Memphis exchange, which was consummated before his connection with the company, but from the record testifies that this price was \$220,000.00, to be paid in cash or in paid-up stock of the Cumberland Company. (Record p. 85.)

At the time that Mr. Caldwell took charge in 1885, the number of connections at the Memphis exchange was 802. This increased gradually at first, the company having in 1890, 1,454 subscribers; in 1900, 2,430, and in 1908, the growth in the meantime having become more rapid, it had 7,786 subscribers. (Record p. 86.)

Mr. Caldwell declares that the Memphis exchange was thoroughly up-to-date in every particular, and was equipped with all of the latest improved and most modern instruments. (Record pp. 101-3.) He claims further that the actual cost in money of the company's plant at Memphis at the close of November 30th, 1907, was \$1,125,968.76. His exact testimony upon this point is as follows (Record p. 88):

“Q. Please state the exact cost in money of the company’s plant at Memphis at the close of November 30th, 1907?

A. At the close of November 30th, 1907, the cost of the company’s plant was \$1,125,968.76.

Q. Please state whether or not that plant at that time could have been duplicated if built new for that amount of money?

A. It certainly could not have been duplicated for any less, and I doubt if it could have been duplicated for so small an amount.”

This testimony is exceedingly interesting, in view of the fact that it is absolutely the only proof of any kind or character in the record as to the present value of the Memphis plant. It will be noted that the witness gives no basis for his estimate, and expresses merely his unsupported opinion that the plant was worth what the company had paid for it. Nor does he testify as to the various items of expenditure which have gone to make up what the company claims to be the cost of the Memphis exchange. There is, therefore, absolutely no opportunity afforded from his testimony for the Court to say whether the expenditures which the company has made in Memphis were wise or unwise, careful or extravagant.

Mr. Caldwell declares that the Memphis exchange has never been a paying proposition since 1902. In that year the income was at the rate of 6 13-100 per cent., the subsequent years being as follows: For 1903, 2 73-100 per cent.; for 1904, 3 14-100 per cent.; for 1905, 4 54-100 per cent.; for 1906, 2 97-100 per cent., and for 1907, 2 56-100 per cent. (Record p. 89.)

There is no attempt made to explain why the Memphis telephone exchange has been converted from a gainful proposition into a losing one in the witness’ examination-in-chief, and when called upon in cross-examination to declare what was the cause why the Memphis exchange did not show the same rates of earnings that other cities did, the only explanation he can give is as follows (Record p. 123):

“Without getting the figures out, the main thing that is on my mind is that for some time there has been a moving; the exchange looks like it was on wheels, changing grade lines, changing sidewalk lines, agitation about wages and strikes and litigation, and the Lord knows

what all; the shifting of poles on every street nearly in town, if not shifting from line to cables, it is from cables to underground, and from one side of the street to the other, and changing of grade lines and shifting of poles to them; it has been a continuous outpour of money."

No detailed statements of any kind or statistics are given to back up this exceedingly general answer, and the Court is simply left with the naked statement of the witness as to the fact that the net earnings of the Memphis exchange have continuously dwindled, although its receipts have shown a regular increase.

Upon cross-examination this witness shows, moreover, that all of the concessions of any kind which his company has been compelled to make in Memphis have been made to other cities where the rate of income is much higher, but he is unable to explain why these differences in income exist. In short, to summarize, Mr. Caldwell's testimony is that the company claims to have invested in Memphis a certain amount upon which it is not earning an adequate income. This is given as the witness' opinion, to substantiate which he introduces no statistics or vouchers or any other data from which the Court can deduce the correctness or incorrectness of his opinions.

The next witness for the company was its auditor, Mr. H. Blair Smith, who declared that the rate of earnings for 1907 was only 2 8-100 per cent., and filed certain exhibits to substantiate this fact. He states further as to the source of these exhibits:

"Q. I will ask you if you have made up a statement from the books and records in your office, showing the earnings and expenses of the exchange at Memphis, Tennessee, belonging to the defendant company, for the years 1902 to 1907, inclusive?

A. I have." (Record p. 129.)

It therefore appears that Mr. Blair Smith's testimony is based upon transcripts of books and records of his office, which books and records are not introduced to the Court.

At the time of the passage of the ordinance, the schedule of rates in force by the Cumberland Telephone & Telegraph Company in Memphis was \$90 per annum, payable quarterly in advance for business telephones with direct connections; for like service where two business houses were on the same line, but each using a separate telephone, \$54 per annum, payable



quarterly. The residence rates were, for a single direct telephone, \$42 per annum, payable quarterly in advance; for residences with two telephones upon the same line, \$36 per annum, also payable quarterly in advance. Where the payments were thus made quarterly in advance, a discount of 50 cents per month was allowed for each bill.

The company was also giving a rate of \$48 per annum for business houses, where there were four upon one line, but was furnishing such service to those only who had it already installed, and was not quoting this rate to new subscribers. There were also some telephones formerly used in private houses which enjoyed a rate of \$35 per annum for business, and some residences where the rate was as low as \$30 per annum for single direct lines. The company, however, allowed no new subscribers the benefits of such rates.

It further appears from Mr. Smith's testimony that there were numerous telephones where the rate was as low as a dollar or \$1.50 per month, some of which were extension sets, and others connections with private switchboards.

The rates fixed by the ordinance were not exceeding \$5.00 per month for business telephones, and not exceeding \$2.50 per month for residence telephones. It was further provided that the charges should be payable monthly in advance, and that 50 cents additional per month could be collected from all subscribers in arrears after the 10th of the month.

Mr. Smith declares that the difference between the existing rates of the company and those which the ordinance prescribed would be almost \$26,000 per annum. (Record p. 130.)

Upon cross-examination, the witness shows that the Cumberland Telephone & Telegraph Company earns 9 per cent. upon its system as a whole, of which 7 per cent. for a number of years has been payable to stockholders. (Record p. 131.)

The company also had a surplus and a reserve account for deferred maintenance of \$3,500,000. The witness was not able to specify the earnings of certain of the large cities upon the company's lines, but subsequently prepared an additional exhibit to his deposition, in which these were shown. All of these cities disclose a rate of income far below the 9 per cent. which the company yearly earns upon all of its capital stock, one of the cities, Louisville, earning nothing at all. (Exhibit 8 to Mr. Smith's deposition.)

The witness further testifies that it is the long distance business which pays the company its real revenue, the city



lines acting as feeders for this service. There is no method in which the expense of maintaining the long distance and the local lines can really be separated, but the company has adopted an arbitrary method of allowing a certain amount of long distance business to be credited to the local exchanges. (Record p. 133.)

Mr. Foster Hume, the telephone superintendent over Memphis and the surrounding territory, testifies merely as to the number of poles in the city of Memphis and as to the cost which the city would incur if it endeavored to install its own fire alarms and conduit systems. He gave no figures upon the question of confiscation, so that all of the company's proof upon this subject is based upon the evidence of its president and its auditor.

The company also took the deposition of Mr. S. T. Carnes, the former owner of the telephone system in Memphis, who testifies solely as to his transactions with the city and the manner in which he installed his plant originally, and how and for what consideration he sold to the Cumberland Company.

The sole proof, therefore, as to the confiscatory character of the rates offered by the complainant is contained in the depositions of its president and its auditor. It will be noted that neither of these gave the Court any information upon telephone conditions elsewhere than in Memphis, and furnish no data from which it can be determined what is a fair value of the service to the citizens of Memphis. The assumption of the complainant, indeed, seems to be that it is entitled in any event to earn a fair income upon the amount of the capital which it has charged to the Memphis exchange as the cost thereof.

The City of Memphis, upon the issue of confiscatory rates, relied upon the facts developed in the cross-examination of the company's witnesses, and also upon conditions which were shown to exist in other cities. It appeared from the testimony of Mr. Carnes that the Memphis exchange, which was capitalized only at \$100,000, and for 49 per cent. of which he received only \$43,200, was sold to the Cumberland Company by those parties who bought it from Mr. Carnes for \$220,000. It also appears that the parties who acted as the middlemen in this transaction, buying from Carnes and selling to the Cumberland, were two of the directors in the Cumberland Company. (See Supplemental Record, Deposition S. T. Carnes.)

The tables introduced by the City of Memphis show that in a great many cities where the number of connections were as great or greater than those in Memphis, that the rates charged to subscribers were very much less than those of the Memphis exchange. These tables appear in the record at pages 210-211.

The city also introduced certain of the advertising matter of the company, in which it was set forth that it was a flourishing concern, earning large dividends and upon a most sound financial footing.

A stipulation of facts was entered into between the counsel (Record p. 210 et seq.), by which it was agreed that the tables introduced by the city would be sworn to by Mr. Vinton Sears. That the contract with the city of Evansville was as shown, and that the other exhibits were from the sources claimed.

The city also took the deposition of Mr. R. E. Moran, which was to the effect that all of the moving of poles upon which Mr. Caldwell had laid such stress did not cost the company to exceed \$1,000 a year. (Record pp. 207-8.)

To rebut the proof of the City of Memphis as to telephone conditions elsewhere, the company re-introduced its president, Mr. Caldwell. He testified that all of the companies granting the rates which were lower than those in Memphis were independent companies, and not connected with the Bell Telephone Company, or the telephone trust. He further alleged that certain of the companies which he specified were in bankruptcy, or nearly so, and would not be able to maintain the rates which they were at present charging. He did not explain as to the rates in a large number of the cities, although he claimed to possess knowledge as to the rates all over the United States. As to these places where the Bell companies themselves were charging lower rates than in Memphis, Mr. Caldwell claimed that these companies were also in bad condition, or that the service was not of the same character as that given to the City of Memphis. He also introduced as an exhibit to his deposition a report of a committee of the Chicago City Council, and a report as to the situation of certain cities in Europe.

There was no attempt made by the company to show in detail any difference between the conditions at Memphis and the cities where the rates were low. Indeed, as will be later shown in the argument, Mr. Caldwell's explanation is one confined to a very few cities, and of a very hazy and uncertain

character. Nor does this witness qualify as an expert as to the matters concerning which he is testifying, basing his ability to describe conditions in many other cities solely upon a general fund of information which he has derived from various sources. In short, upon the issue of confiscation, there is no definite, clear and certain proof as to what is the reasonable value of the services to the public, and no competent and clear evidence from which the Court could determine the actual value of the exchange at Memphis, or what it would cost to reproduce all of its equipment.

There was no evidence introduced by either party as to the powers of the City of Memphis, the question in this regard turning wholly upon the construction of certain acts of the Tennessee Legislature which constituted the charter of the City of Memphis.

From these acts it appears that the City of Memphis was in some financial straits, and subsequently its charter was repealed, and it was constituted a Taxing District. The new form of government was given the very broadest possible powers in every particular, save as regards to taxation, and was allowed to exercise the fullest and most complete police powers over all of the matters within its limits. The particular sections of the city charter material to this controversy are as follows (Acts of Tennessee, 1879, Chapter 11, Section 3):

“Be it further enacted, That the local government established by this act shall have power to repair and keep in repair streets, sidewalks, and other public grounds and places in the taxing district; to open and widen streets; to change the location or close the same; and to lay off new streets and alleys when necessary, and to have and exercise the entire control over all streets and other public property of the taxing district, as well that within as that without the taxing district. And they shall have power over all other affairs in the taxing district in which the peace, safety and general welfare of the inhabitants is interested.”

Acts of Tennessee, 1879, Chapter 11, Section 4:

“Be it further enacted, That the legislative council as established in Section 2 of this act, shall be vested with the power and charged with the duty of making all laws and regulations not inconsistent with the general laws for every object, matter and subject within the local government constituted by this act.”

## Chapter 54, Acts of 1905, Section 21:

"Be it further enacted, That the legislative council shall have the power to pass for the government of the city any ordinance not in conflict with the constitution or laws of the United States or of the State of Tennessee."

In addition to these general grants of power to control everything within its borders, the City of Memphis claimed that it had been further given specific powers over the rates of public service corporations within its limits by Chapter 366 of the Acts of Tennessee of 1903, Section 1, Sub-section 1, as follows:

"The Legislative Council of such Taxing District is hereby vested with the power and authority to fix and regulate, from time to time, within reasonable limits, the scale of charges for the product or service of all district telegraph companies, gas companies, electric light and power companies, street car companies, belt line companies, switching companies, now or hereafter enjoying or operating any rights or privileges, to use or occupy any of the streets, alleys or public grounds within the territory of such taxing district."

It is solely upon the construction of the force and effect of the sections above cited that the Court must determine whether or not the City of Memphis had the power to pass the ordinance in question.

As to the third contention of the complainant, that a contract between it and the City of Memphis had estopped the city from claiming the right to regulate rates, there was also no direct oral evidence introduced. The company claimed below that inasmuch as it was upon the streets of Memphis by permission of the municipal authority, originally given to S. T. Carnes, that in some way this prevented the City of Memphis from exercising its police powers to regulate rates. This contention is so obviously unsound that we do not believe it would be pressed before this Honorable Court, and that it, in fact, has been abandoned. The status of the company in the City of Memphis has, as shown above, been definitely settled since the institution of this suit by decree of the Supreme Court of Tennessee.

The next contract which the company claimed gave it the right to regulate its own rates in the City of Memphis was

the compromise of a suit brought by the City of Memphis to collect rentals for its poles.

Upon the belief that it possessed the power to oust the Cumberland Company from the streets of Memphis at will, the city passed an ordinance that all pole using companies should pay the City of Memphis a certain stipulated rental for the use of each pole annually. This ordinance is made one of the exhibits to the complainant's bill, and is found in full in the record. (Record p. 60.)

At the time of this litigation over the right of the city to collect these rentals, the company made an offer of compromise, which was accepted by the city. The contract is found in the record at page 58, as follows:

“Whereas, for the recovery of certain pole rentals, provided for under the ordinance of the City of Memphis, passed February 25th, 1902, a suit was instituted by the City of Memphis against the Cumberland Telephone & Telegraph Company on June 25th, 1902, in the Chancery Court of Shelby County, Tennessee, which was removed to and is now pending in the United States Circuit Court;

And whereas, the said City of Memphis and the said Cumberland Telephone & Telegraph Company desire to compromise and settle said suit:

It is now stipulated and agreed between the said parties that in consideration for the agreements and undertakings by the said Cumberland Telephone & Telegraph Company, hereinafter set out, the said City of Memphis, after the payment of all court costs by the said Telephone Company, hereby orders said suit to be dismissed. In compromising and dismissing said suit, however, said city does not surrender any right that it may have to collect a pole rental from the Telephone Company, except for the years 1902 and 1903. For any year or years after 1903 the right of the city to collect a pole rental from the said company remains unchanged and unprejudiced by this agreement in compromise of the pending suit, and whatever rights, if any, the said Telephone Company may have in the defense of any suit brought for such rental are also unprejudiced by this agreement.

The several undertakings and agreements of the said Cumberland Telephone & Telegraph Company with the City of Memphis, which are the considerations for the dismissal of said suit, are as follows:

First. The said Telephone & Telegraph Company, in the exercise of any right which it may have, shall not charge for its service as a telephone company an amount which shall exceed an average per station one dollar per week until the number of stations connected with the exchange of said company shall exceed 7,000, when the limitation upon charges fixed in the contract shall cease.

Second. The said Telephone Company shall furnish free for the use of the fire and police alarm wires of the said city, one duct in its present underground system, and such additional system as it may construct from time to time, together with the necessary and proper space in the various manholes for the use of the wires. Said telephone company shall also furnish free, for the use of the police and fire alarm wires of the city, space upon all of its poles now or hereafter erected, and shall erect up-rights and cross arms of such reasonable dimensions and construction as the city may direct upon the top of its poles, for the placing of the said city wires; but the city's wires shall be so placed as not to interfere with the wires of said Telephone Company.

Third. That said Telephone Company shall erect and establish a ringing circuit, and furnish bells and generators for the use of the same in all of the fire engine houses now used or hereafter to be acquired and used by the city. Said Telephone Company shall also establish and erect a twelve-drop switchboard for the police station of said city and extension lines for eight desk sets in the police station of said city.

Fourth. Said Telephone Company shall furnish telephones free of charge to the following city institutions and offices, viz.: City Secretary's office, Mayor's office, Board of Health, two Crematories, Engineer's office, two city stables, Hospital, Board of Education, and the same service to public schools as now rendered.

Fifth. The performance of the things hereinbefore specified shall be a continuing obligation upon said Telephone Company, its successors and assigns, so long as it may exercise any rights that it may have to do a telephone business in the City of Memphis."

It will be noted that this contract provided that the company shall not charge a maximum rate which shall exceed \$1.00 per week per station until the number of telephone connections with its Memphis exchange reaches 7,000. It was



the contention of the City of Memphis below that this did not in any way bind the city not to compel the company to charge a lower rate if such lower rate was the fair and reasonable amount which should be paid for the services rendered. It was contended by the company that the maximum rate which the contract prescribed was also the minimum rate which the city could compel the company to charge, and that when the number of connections exceeded 7,000 the company was free to charge any rate that it saw fit. In other words, it was insisted that by this contract the City of Memphis had abandoned its police power to protect its citizens from oppressive rates.

The above summary sets forth in brief, we believe, all of the contentions of the respective parties and the main portions of the evidence in support thereof. The case in its final analysis must rest upon the construction of the various acts of the Legislature, and upon a proper analysis of the evidence of both parties, which we shall endeavor to give in the appended brief and argument.

## ASSIGNMENTS OF ERROR.

### I.

That the said United States Court erred in denying and overruling respondents' application for a continuance, and for further time to take proof in said cause, both in its order entered on the 27th day of May, 1908, and in its decree entered on the 12th day of June, 1908.

### II.

That the said Court erred in adjudging and decreeing the ordinance of the City of Memphis involved in this cause and set out in complainant's bill to be in violation of the Fourteenth Amendment to the Constitution of the United States, and illegal and void; and adjudging the costs against the respondents.

### III.

That the said Court erred in awarding and ordering a permanent injunction restraining respondents from enforcing the aforesaid ordinance and the telephone rates provided therein.



IV.

That the Court erred in entering any decree against respondents upon the pleadings in said cause, and the facts therein.

V.

That the Court erred in refusing to dismiss complainant's bill, and to dissolve the injunction.

BRIEF.

I.

The Court erred in holding that the rates prescribed by the ordinance were so unreasonable that they were confiscatory and violative of the Fourteenth Amendment of the Constitution of the United States.

(A) The power to regulate public service corporations is vested in the governing body of the states, to-wit, its legislature.

Munn v. Illinois, 94 U. S. 113.

Chicago, M. & St. L. v. Ackley, 94 U. S. 181.

Stone v. Farmers Loan & Trust Co., 106 U. S. 307.

Smyth v. Ames, 169 U. S. 466.

The complainant is of the class of corporations subject to regulation.

Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238.

Home Tel. Co. v. Los Angeles, 211 U. S. 255.

R. R. Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414.

(B) This power to regulate rates can be conferred by the legislature upon the authorities of a municipality, or upon a commission or board.

Cooley's Constitutional Limitations, Sec. 204.

Dillon on Corporations, Sec. 96.

Wright v. Nagel, 101 U. S. 791.

N. O. Waterworks v. New Orleans, 164 U. S. 481.

City Railway v. Citizens St. Ry., 166 U. S. 557.

(C) When rates have been prescribed the Court will presume that they were prescribed by proper authority, and are reasonable. The party complaining of the rate must show that they are so unreasonably low as to amount to a confiscation, and thus overcome the presumption in favor of the statute or ordinance.

City of St. Louis v. Western Union Tel. Co., 63 Fed. 68.

City of Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348.

McQuillin on Municipal Ordinances, Section 585.

Abbott's Municipal Corporations, Vol. 3, Sec. 913.

Freund on Police Power, stating the following rule:

"In other words, legislative rates are presumptively reasonable, and the burden of showing that they are not lies upon the railroad company."

Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238.

"The courts always presume that the legislature acts advisedly."

City of St. Louis v. Western Union Tel. Co., 63 Fed. 68.

City of St. Louis v. Western Co., 63 Fed. 68.

Freeport Water Co. v. Freeport City, 180 U. S. 587.

"The judiciary ought not to interfere with rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of private property for public use without compensation."

San Diego Town & Land Co. v. National City, 174 U. S. 754.

Chicago & Grand Trunk R. R. v. Wellman, 143 U. S. 339.

Regan v. Farmers Loan & Trust Co., 154 U. S. 362.

Henderson Bridge Co. v. Henderson City, 173 U. S. 592.

Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 264.

Dow v. Beidelmann, 125 U. S. 680.

Chicago, Milwaukee & St. Paul R. R. Co. v. Tompkins, 167 U. S. —.

“The presumption is that rates fixed are reasonable, and the party attacking has the burden of proving that they are not so.”

Budd v. New York, 143 U. S. 507.  
 Mo. Pac. R. R. v. Smith, 60 Ark. 221.  
 Rohn v. Beardstown, 32 Ill. App. 407.  
 Henry v. Roberts, 50 Fed. 902.  
 Cotting v. Kansas, 183 U. S. 79.

This rule is one strictly enforced by the courts, and the parties upon whom the burden rests must establish his case by the clearest sort of proof, so that the Court can see that the body fixing the rates could not have acted with justice and fairness.

San Diego Land & Town Co. v. National City, 174 U. S. 739.  
 Chicago & G. T. R. R. v. Wellman, 143 U. S. 339.  
 Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201.  
 Dow v. Beidelmann, 125 U. S. 680.  
 St. Louis & S. F. R. R. v. Gill, 156 U. S. 649.  
 San Diego Land & Town Co. v. Jasper, 189 U. S. 439.  
 Minneapolis & St. L. R. R. Co. v. Minnesota, 186 U. S. 257.  
 Atlantic Coast Line R. R. v. Florida, 203 U. S. 256.  
 Seaboard Air Line v. Florida, 203 U. S. 270.  
 Alabama & Vicksburg R. R. Co. v. Miss. R. R. Com., 203 U. S. 496.  
 Knoxville v. Knoxville Water Co., 212 U. S. 1.  
 Wilcox v. Consolidated Gas Co., 212 U. S. 19.  
 Railroad Commission of La. v. Cumberland Tel. & Tel. Co., 212 U. S. 414.

If the proof leaves the Court in doubt as to whether or not a rate is confiscatory, the matter must be left to a test experiment under the new rate.

Wilcox v. Consolidated Gas Co., 212 U. S. 19.  
 Pensacola & Atlantic R. R. v. State, 25 Fla.  
 C., B. & Q. R. R. v. Dey, 38 Fed. 656.  
 Knoxville Water Co. v. Knoxville, 212 U. S., p. 1.

(D) In order to show that a rate is unreasonable complainant must establish, (1d) that the rate is fair to the pub-

lic, and (2d) if possible, yield to complainant a fair return upon its investment.

(1d) There are circumstances which may require the public service corporation to do business at a loss.

Cotting v. Kansas, 183 U. S. 79.

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578.

Smith v. Ames, 169 U. S. 466.

San Diego Land & Town Co. v. National City, 174 U. S. 757.

St. R. R. Co. v. Minnesota, 186 U. S. 257.

The question of the reasonableness of a rate involves the question of reasonableness both to the public and to the company.

C. M. & St. P. R. R. v. Minnesota, 134 U. S. 450.

C. M. & St. P. R. R. v. Tompkins, 176 U. S. 157.

Stanislaus County v. San Joaquin, etc., Co., 193 U. S. 201.

“A reasonable rate is one which is reasonable both to the public service corporation and to the public. Rates are not necessarily unreasonable because they yield a small per cent upon the capital invested.”

Covington & L. Turnpike Road v. Sanford, 164 U. S. 578.

“It is not an absolute rule that a failure to produce profit to investors is conclusive that the rate is unreasonable.”

Regan v. Farmers Loan & Trust Co., 154 U. S. 362.

Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257.

“The interest of the public must be considered in every case and what is reasonable is the fair value of the services.”

Smyth v. Ames, 169 U. S. 466.

San Diego Town & Land Co. v. National City, 174 U. S. 757.

“The party undertaking to do the public service does so with knowledge that he may be made to do it at a loss.”

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578.

“The question is whether the charge is an unreasonable exaction, not the amount of profit made.”

Parkersburg & Ohio Transportation Co. v. Parkersburg, 107 U. S. 691.

Cotting v. Kansas, etc., 183 U. S. 79.

The customary charges for the same service in other cities is the fair index of what the service is reasonably worth to the citizens of Memphis.

Cotting v. Kansas, 183 U. S. 79.

Shepherd v. Payne, 12 C. B. N. S. 414.

Louisville, E. & St. L. R. R. v. Wilson, 119 Ind. 352.

Wilcox v. Consolidated Gas Co., 212 U. S. 19.

St. Louis & S. F. R. R. v. Gill, 156 U. S. 657.

Tenement House Department v. Moeschler, 89 App. Div. 538, 179 N. Y. 330.

The City of Memphis showed what the rates were elsewhere and that they were as low or lower than those called for by the ordinance. The company did nothing to overcome this presumption.

(2D) The complainant must show the reasonable value of its property at the time it was being used for public service.

Springfield Waterworks Co. v. San Francisco, 124 Fed. 574.

San Diego Town & Land Co. v. Jasper, 189 U. S. 439.

Redlands L. & C. Domestic Co. v. Redlands, 121 Cal. 365.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

San Diego Land & Town Co. v. National City, 174 U. S. 739.

Cotting v. Kansas, 183 U. S. 79.

Smith v. Ames, 169 U. S. 547.

Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201.

It is not sufficient to show merely the amount of the capital stock and the rate of earnings thereon. (Cases supra.)

Rates are not necessarily unreasonable because they do not yield returns on all portions of the line.

St. Louis & S. F. R. R. Co. v. Gill, 156 U. S. 649.  
Mo. Pac. R. R. Co. v. Smith, 60 Ark. 221.  
Re Auburn & W. R. Co., 37 App. Div. 162.  
Morgans L. & T. Co. v. R. R. Com., 109 La. 247.  
Pensacola & A. Co. v. State, 25 Fla. 310.  
People ex rel. v. St. Louis, etc., R. R., 176 Ill. 512.  
Chicago Union Traction Co. v. Chicago, 199 Ill. 579.

The Memphis exchange was part of the general system and all of its cost should not be charged up against the earnings of the Memphis exchange alone. It should receive a fair share of the earnings from long distance business, but the company's estimates do not give it.

Local and long distance business must be apportioned just as local and interstate business are apportioned.

Atlantic Coast Line R. R. v. State of Florida, 203 U. S. 256.

Seaboard Air Line R. R. v. State of Florida, 203 U. S. 261.

The complainant has charged to the Memphis exchange large amounts of expense with which it should not properly be burdened. It is also made to bear a large proportion of the general expense of the entire company. Its net earnings are underestimated over \$23,000.

It is made to bear a large expense of the long distance service, and is given only 15 per cent of the long distance revenue. Its revenues should be increased from this source nearly \$70,000.

The company would not have to reduce its rate on all of its telephones on account of the ordinance, but could increase the rate on many of them, which are being given the public at less than the ordinary rate. This would prevent any such loss as is claimed by the company would result from the ordinance.

The company should have introduced proof of the actual cost of the exchange in some other manner than by mere calculations made from its books.

Stanislaus County v. San Joaquin, etc., Co., 202 U. S. 215.

## II.

The City of Memphis had the power to regulate rates.

This power can be given by the legislature to a municipal government.

Cooley's Constitutional Limitations, Sec. 204.

Dillon on Corporations, Sec. 36.

Wright v. Nagel, 101 U. S. 791.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 481.

City R. R. Co. v. Citizens St. Ry., 166 U. S. 557.

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685.

Walla Walla Water Co. v. Walla Walla, 172 U. S. 9.

Atty. General v. Old Colony R. R., 160 Mass. 67.

Georgia R. R. v. Smith, 70 Ga. 694.

Chicago, etc., R. R. Co. v. Jones, 149 Ill. 380.

R. R. Commissioners v. Grocer Co., 53 Kansas, 212.

Clyde v. Richmond, etc., R. R. Co., 57 Fed. 439.

This power is given to the City of Memphis by the various acts constituting its charter.

See Acts of 1879, Chapter 11, Sec. 3.

See Acts of 1879, Chapter 11, Sec. 4.

See Acts of 1905, Chapter 54.

A city government can be given very full power so that it is practically an *imperium in imperio*.

Barnes v. District of Columbia, 91 U. S. 940.

Tippecanoe County v. Lucas, 93 U. S. 108.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505.

Abbott's Municipal Corporation, Vol. 1, 198.

Phelps v. Watertown, 61 Barb. 121.

Leeper v. State, 103 Tenn. 531.

The general police powers granted to a municipality are frequently sufficient to allow it to regulate rates.

Crooms v. Shad., 40 So. Rep. 497.

St. Louis v. Shoenbusch, 95 Mo. —.

Porter v. Vinzant, 38 So. 607.

White v. Commonwealth, 92 S. W. 285.

Sayreborough v. Phillips, 148 Pa. 482.



The Tennessee legislature has conferred the fullest police powers on the City of Memphis.

Act of 1879, Chapter 11, Secs. 3, 4 and 10.

These were extended by the Acts of 1905, Chapter 54, and Memphis was given the fullest police powers, and also made a miniature state.

The City of Memphis is given express power to regulate various public utilities as to rates, and among these is included district telegraph companies.

Chapter 366, Acts of 1903.

The term "telegraph companies" is broad enough also to embrace "telephone companies."

Bell Tel. Co. v. Com., 3 At. Rep. 825.

Cumberland Tel. Co. v. United Electric Ry. Co., 42 Fed. 273.

Roake v. American Tel. Co., 41 N. J. Eq. 35.

Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

Roberts v. Wisconsin Tel. Co., 77 Wisconsin, 589.

David vs. Pacific Tel. & Tel. Co., 127 Cal. 312.

Cincinnati Incline Plane Co. v. City, etc., Ass'n, 48 Ohio St. 390.

Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399.

State v. Central of N. J. Tel. Co., 53 N. J. Law, 341.

City of Richmond v. Southern Bell Tel. & Tel. Co., 85 Fed. 19.

Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32.

### III.

The company had no contract with the City of Memphis authorizing it to charge any rates it pleased.

The power to control rates is a police power which it is generally held cannot be contracted away.

Stone v. State of Miss., 101 U. S. 814.

Rogers Park Water Co. v. Fergus, 128 U. S. 28.

R. R. Com. Cases, 116 U. S. 316.

Freeport Water Co. v. Freeport, 180 U. S. 587.

Louisville & Nashville R. R. v. Kentucky, 183 U. S. 517.

Decatur v. Decatur Gas Co., 120 Ill. 67.

Manhattan Trust Co. v. Dayton, 59 Fed. 327.

Abbott's Municipal Corporations, Vol. 3, Sec. 127.

Danville v. Danville Water Co., 178 Ill.  
 Lowell Fork & S. H. R. R. v. West Va., 25 W. Va. 324.  
 West Va. Transportation Co. v. Switzer, 25 W. Va. 434.

If the power to perpetually fix its own rates is given to a public service corporation it must be in the clearest and most unmistakable terms. (Cases cited, *supra*.)

If the City of Memphis had the right to refuse the company permission to use the streets, it could exact any terms it saw fit, as a condition for its consent. All that the permission granted Carnes to put a telephone company in Memphis shows is the fact that the company is not a trespasser. Memphis has not bargained away its police power by giving the company power to enter and do business. The difference is clearly shown in many cases.

3 Elliott on Railroads, Ch. 42, Sec. 1076.  
 Northern, etc., R. R. v. Baltimore, 21 Md. 93.  
 Ruttle v. City of Covington, 10 S. W. 644.  
 Detroit v. Detroit City R. R., 37 Mich. 558.  
 Moundsville v. Ohio River R. R., 37 West Va. 92.  
 Blair v. Chicago, 201 U. S. 400.  
 Illinois Trust & Savings Bank v. Ark. City, 96 Fed. 271.  
 Chicago v. Sheldon, 76 U. S. 50.

The compromise of the pole rental case was not an agreement that the company could charge any rate it saw fit. The company was limited as to a maximum, but this did not bind the city to permit it to exact the maximum rate.

Knoxville Water Co. v. Knoxville, 189 U. S. 436.

The city could still prescribe reasonable rates, and when the contract expired, and the limitation as to maximum rates ceased, the parties were governed by the general law, to-wit, that rates must be reasonable.

The company was under the duty of showing that the contract had expired. This it has not done, but its rates are larger than those allowed by the contract.

## ARGUMENT.

The first assignment of error is to the action of the trial judge in refusing to grant a continuance of the cause to take further proof.

We find, upon examining the record, that the trial counsel filed no affidavits in support of their motion for a continuance, and as the matter was one within the discretion of the Court, there is nothing before this Honorable tribunal upon which this assignment may be sustained. It is, therefore, abandoned.

All of the other assignments of error complain of practically the same thing, to-wit, the action of the trial judge in allowing the injunction and in refusing to dismiss the complainant's bill. We shall, therefore, not attempt to differentiate between the various assignments, but shall consider the case in the various aspects which the contentions of the respective parties present, considering (first) whether the Court was correct in holding the rates to be so unreasonable as to amount to confiscation; (second) whether granting the rates to be reasonable the City of Memphis had the power to order them put into effect; (third) if there existed any contractual or other obligation which prevented the power possessed by the city from being exercised.

## I.

The first question to be considered is the action of his Honor, the trial judge, in holding that the rates prescribed by the city ordinance were so unreasonable as to amount to a confiscation of the defendant's property, in violation of the Fourteenth Amendment to the United States Constitution.

In the Court's opinion, a great deal of erudition is displayed, but from this opinion itself, it seems evident that the trial judge has misconstrued the holdings of this Honorable Court upon the subject of rate regulation. In seeking for an exact rule, he has followed the letter rather than the spirit of the decisions upon the subject, and he has, therefore, been inevitably led to an erroneous conclusion.

We feel, also, that the evidence has not been considered as it should properly be in the light of the authorities, and, therefore, those inferences which necessarily follow from the testimony before the Court, have been in many instances overlooked.

It is natural that there should be some confusion upon the subject of rate regulation in view of the fact that eminent lawyers have declared the decisions of this Honorable Court to be in conflict upon certain phases of the subject. It is with some hesitation, therefore, that we advance the theory that all of the decisions, far from being in conflict, are harmonious, and that the same principles underly them all. We believe that the following rules are clearly established when all of the decisions of the United States courts are taken together and considered as a complete whole:

(A) The power to regulate public service corporations is vested in the governing bodies of the state, to-wit, its legislature.

(B) This power can be, by the legislature, conferred upon the authorities of a municipality, or upon a commission or board.

(C) When this commission or board has acted, the rates prescribed by it are presumed reasonable, and the Court will not interfere until the party complaining of the schedule is able to show that it is so unreasonably low as to amount to a confiscation, and to overcome the presumption in favor of the statute.

(D) That reasonable rates mean, first, such rates as enable the public to secure the services of public utility corporations at a price which represents what such services are worth to the public, and which allows, if possible, to the corporation a fair return upon its investment.

We shall for convenience discuss these rules separately, considering under each of them, first, whether they are supported by sound reasoning and the authorities so that they are really established; next, their ramifications and modifications and, finally, their applicability to the case at bar and whether the party upon whom the burden of proof in each instance rested has sustained that burden by the introduction of proper and sufficient testimony.

#### (A)

It is now certainly established beyond any cavil or question that the right exists in the legislature to regulate the charges of all public utility corporations, or all corporations that are affected with a public use. This doctrine was first declared in *Munn v. Illinois*, 94 U. S. 113, where it was held that the charges of a grain elevator could be regulated by statute, al-

though the elevator was owned entirely by private parties. This case was decided upon the theory that the elevator in this case was a monopoly such as came within the rule laid down in the leading English case of *Alnutt v. Inglis*, 12 East 527.

The courts, however, almost immediately held that the like rule applied to railroads, and to those cases in which there was no element of monopoly, but where property was affected with a public use.

*Chicago, Milwaukee & St. Paul R. R. v. Ackley*, 94 U. S. 181.

*Stone v. Farmers Loan & Trust Company*, 106 U. S. 307.

*Smyth v. Ames*, 169 U. S. 466.

It now seems established that as to rate regulation, corporations affected with a public interest may be roughly divided into two classes. These are well set forth by Mr. Justice Brewer in the case of *Cotting v. Kansas, etc.*, 183 U. S. 79. Those corporations which are essentially public in character because they are carrying out some of the functions of the state, and on that account are endowed with certain of the prerogatives of the government, are, of course, subject to regulation regardless of their circumstances or surroundings. These constitute the first class.

Secondly, corporations which, by reason of the fact that they have a monopoly of the business, that constitute from their very nature a monopoly, or are affected otherwise with the public interest, are, on account of these circumstances, subject to the right of regulation by legislative authority.

The right of the legislature to regulate rates of the telephone company cannot be denied, as it is admittedly within the class of corporations expressly vested with governmental powers and functions, and, therefore, subject to governmental control.

Such was the decision of this Honorable Court in the case of *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U. S. 238, and in the subsequent decisions of *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, and *Railroad Commission v. Cumberland Telephone & Telegraph Company*, 212 U. S. 414.

### (B)

So far, the law is unquestioned and without any shadow of a conflict. That this power of regulation is possessed by the legislature to its fullest extent has not recently been denied,

and it seems now to be equally well established that a legislature has the right to delegate such power to a municipality. This rule has been declared by numerous decisions, and is now the accepted doctrine of all the leading text writers upon the subject.

See Cooley's Constitutional Limitations, Sec. 204.

Dillon on Corporations, Sec. 96.

Wright v. Nagel, 101 U. S. 791.

New Orleans Waterworks v. New Orleans, 164 U. S. 481.

City Railway Co. v. Citizens Street Railway Company, 166 U. S. 557.

This subject will necessarily be considered at some length when we come to discuss the claim of the complainant below that the City of Memphis did not possess the power to regulate the rates because the power was first of all non-delegable and, secondly, had not been properly conferred upon the city, even if it were a permissible grant. We shall, therefore, in the discussion of the error complained of under this head, assume, as did the trial judge, that the City of Memphis possessed the power, and shall proceed to those rules which govern the manner in which the power must be exercised and the propriety of its exercise must be tested.

### (C)

The third principle of the law of rate regulation which seems thoroughly established is that, no matter what is the character of the corporation whose rates have been regulated, the rate as fixed by the legislative body is presumed to be reasonable. There is some difference in the decisions upon this subject as to the force and the effect of the presumption in favor of the reasonableness of the rates, the earlier cases going to the extent of holding that where a corporation was of a public character, that the regulation of its rates by legislative action could not be reviewed by the Court.

See

Munn v. Illinois, 94 U. S. 113.

Rubbles v. United States, 108 U. S. 526.

Railroad Commission Cases, 116 U. S. 307.

Chicago, Milwaukee & St. Paul R. R. v. Ackley, 94 U. S. 181.

Where, however, the corporation is one which is not directly engaged in a public business, or cannot be considered as discharging a governmental function, the courts at an early date assumed to inquire into the reasonableness of the rates fixed by legislative action. It is, therefore, now generally the rule that the action of the legislative body in fixing a rate can always be investigated by the courts for the purpose of ascertaining whether or not the rate fixed is reasonable.

Stone v. Farmers Loan & Trust Co., 116 U. S. 307.  
Smyth v. Ames, 69 U. S. 466.

But the courts have, at all times, held that the rates as fixed by the legislature, or the body to which the legislature had delegated the power, are to be presumed reasonable, and that the burden of proof to show that the rates as fixed are unreasonable, rests upon the party complainant. That is to say, that where a rate has thus been fixed by a proper tribunal, the courts will enforce this rate unless the corporation claiming to have been injured is able to establish that the rate is one which is so low as to amount to a practical confiscation of its property.

McQuillin on Municipal Ordinances, Sec. 585, which says:

“The ordinance fixing the rate of charges will be held *prima facie* reasonable.”

And, again, at Section 588:

“The law will presume street car fares fixed by ordinance to be reasonable until the contrary is shown, and the burden is on the party contending them to be unreasonable.”

The same rule is declared by the eminent author upon municipal corporations (Abbott), Vol. 3, Sec. 913:

“Its exercise (power of regulation of rates) is presumed to be within the powers of the corporation, and in a proper and lawful manner, and as said in a Missouri case, ‘In all matters pertaining to the police regulations of municipalities, their ordinances being of the nature of legislative discretion, are *prima facie* reasonable.’ ”

Freund, in his work upon Police Power, thus states the rule:

“In *Dow v. Biedelmann*, arising under a law of Arkansas fixing the rate of passenger fares, it was held that



without proof of the original cost of the road, the Court had no means, if under any circumstances it would have the power, of determining that the legislative rate was unreasonable, and the burden of showing that they are not lies upon the railroad company."

The case referred to in the above quotation is an opinion of this Honorable Court, being decided in 125 U. S. 680. It announces what seems now to be the settled doctrine of this tribunal, for the same rule is restated and affirmed in a case where telephone rates were regulated.

In an opinion by Mr. Justice Brewer (*Chesapeake & Potomac Telephone Co. v. Manning*), the Court says:

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge." 186 U. S. 238.

The presumption is that the rates fixed by the authority of the legislature are reasonable, and the party attacking has the burden of proving that they are not so.

*Budd v. New York*, 143 U. S. 517.

In *Cotting v. Kansas, etc.*, 183 U. S. 79, the Court, reaffirming the earlier cases, says:

"Its (the legislature) prescription of rates is *prima facie* reasonable."

This rule seems to be thoroughly established in all jurisdictions.

*City of St. Louis v. Western Union Telegraph Co.*, 63 Fed. 68.

*City of Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348.

*Brown v. Chicago Great Western R. R. Co.*, 137 Mo., 529.

*Minneapolis & St. L. R. R. Co. v. Minnesota*, 186 U. S. 264.

*Chicago, Milwaukee & St. Paul v. Tompkins*, 176 U. S. 167.

Nor is this presumption that the rates fixed by the legislative authority are reasonable a mere rule of evidence prescribing the party upon whom the duty rests to introduce the initial proof. It is the very groundwork and foundation of all the United States cases upon the subject that the complainant must make out his case in the clearest and most indubitable manner in order to entitle him to relief. He must not only show that the rates are low, that they reduce his profits and curtail his operations; he must establish that they are such as to amount to a confiscation of his property. There must be in every case a taking of private property for public or private purposes without due process of law to justify the use of the injunctive process by the Federal Courts.

The rights of complainants to relief against rate schedules promulgated by state or municipal authorities rest solely upon the violation of the Fourteenth Amendment to the United States Constitution and the complainant must establish such violation in such a manner—to use the language of one of the cases—that the Court is not left in any doubt that the rate complained of is confiscatory.

The burden placed upon the complainant is of practically the same character as that conviction beyond a reasonable doubt required in criminal prosecutions.

Strong as is this enunciation of the doctrine, we believe it is fully sustained by the many reported cases upon the subject decided by the various United States courts and repeatedly affirmed by this Honorable tribunal.

It is a significant fact as showing the rigidity of the rule that out of all the cases brought before your Honors for relief from rates fixed by various state bodies we have been able to find only three of them in which the rates attacked were set aside as unreasonable. These three cases are:

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.  
Covington & L. Turnpike Company v. Sanford, 164  
U. S. 578.  
Smyth v. Ames, 169 U. S. 466.

In all of these cases the rates complained of were either admittedly so low as to be confiscatory, or the proof to that effect was overwhelming.

On the other hand, the cases in which relief has been denied because of inadequate proof of the confiscatory character of the rates are numerous.

San Diego Land & Town Company v. National City,  
174 U. S. 739.

Chicago & G. T. R. R. v. Wellman, 143 U. S. 339.

Stanislaus County v. San Joaquin, etc., Co., 192 U. S.  
201.

Dow v. Biedelmann, 125 U. S. 680.

St. Louis & S. F. R. R. v. Gill, 156 U. S. 649.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439.

Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257.

Atlantic Coast Line R. R. v. Florida, 203 U. S. 256.

Seaboard Air Line v. Florida, 203 U. S. 270.

Alabama & Vicksburg R. R. Co. v. Miss. R. R. Com., 203  
U. S. 496.

Knoxville v. Knoxville Water Company, 212 U. S. 1.

Wilcox v. Consolidated Gas Co., 212 U. S. 19.

R. R. Commission of La. v. Cumb. Tel. & Tel. Co., 212  
U. S. 414.

There are also many cases from other jurisdictions, but the numerical superiority in this court alone is sufficient to show that the Court has strictly enforced the rule that the complainant must establish his case most convincingly to obtain relief.

The numerical superiority is, of course, merely an index of the Court's holdings, but when the decisions themselves are examined it is evident that the rule is one of the most rigidly enforced and best established doctrines of federal jurisdiction.

In *ex parte Young*, 209 U. S. 123, the Court says at page 166:

**"Finally, it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower federal courts a great flood of litigation of this character, where one federal judge would have it in his power to enjoin proceedings to enforce legislative acts of the state, either by civil or criminal actions. To this it may be answered that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is and will be followed by all judges of the Federal Court."**

In *San Diego Land & Town Company v. National City*, 174 U. S. 739, the Court says:

**"Judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of reg-**

ulation as to compel the Court to say that the rates prescribed would necessarily have the effect to deny just compensation for private property taken for public use."

Again the Court says, in *San Diego Land & Town Company v. Jasper*, 189 U. S. 489, quoting with approval the language above cited:

"In a case like this we do not feel bound to re-examine and weigh all of the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it were impossible for a clear-minded board to come to the result which was reached."

There can hardly be a stronger declaration of the law than this. It is an enunciation that the courts must find that in justice and fair-mindedness the decision of the board in fixing the rate was an impossibility. Surely this is as strong a declaration as we contended for, and imposes upon the complainant the duty of making out his case in such a manner that the Court is certain that the rate is confiscatory.

In *Knoxville v. Knoxville Water Company* (supra), the Court, after approving all of the cases above quoted, says:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

In *Wilcox v. Consolidated Gas Company*, supra, the Court says:

"The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without compensation as under the circumstances is both just to the owner and the public."

And, again:

"The case must be a clear one before the courts ought to be asked to interfere with state legislation on the subject of rates, especially before there has been an actual experience of the practical result of such rates."

In this case the Court lays down and reaffirms the rule which seems now to be settled and established doctrine of the

Federal Court, that where there is any doubt in the matter, the question must be left to the test experiment. That is to say, that the Court must allow the rate to be put into effect, and the complaint must be based upon the result of the actual operation of the rates, unless it is absolutely clear from the evidence that such a rate would be confiscatory.

The principle declared in *Pensacola & Atlantic v. State*, 25 Fla., and *Chicago, Burlington & Quincy v. Dey*, 38 Fed. 656, is cited and affirmed.

Such, also, is the doctrine in the case of *Knoxville Water Co. v. Knoxville*, supra, and indeed it seems to be established as the rule of the Federal Court that unless the complainant makes out his case in so clear and indisputable a manner as to enable the Court to see that in making the rate the property is actually confiscated, the matter must be left for the experiment to decide whether or not the rate is an unreasonable one.

In *Atlantic Coast Line R. R. v. State of Florida*, and in *Seaboard Air Line R. R. Co. v. Florida*, 203 U. S. 256, and p. 261, the Court refuses to examine closely into the evidence upon the theory that the presumption in favor of the rates is sufficient to sustain the contention of the state.

We feel, therefore, safe in our assertion that the third of our rules is established as a doctrine of the federal courts, and one which is in all cases to be enforced.

The complainant below, therefore, was under the obligation of showing to the Court in a clear and unmistakable manner that the rate which it complained of was so unreasonable as to amount to a confiscation of its property and a taking of property in violation of the Fourteenth Amendment of the Constitution of the United States.

We shall, in another part of the brief, show that the defendant has utterly failed to sustain the burden placed upon it, and shall now consider just what this burden was, viz., what are reasonable rates within the purview of the law; that the rates enforced must be reasonable and not confiscatory. In other words, at what point does the taking of property for public or private uses without compensation commence? This brings us naturally to our fourth rule.

(D)

We believe that this is thoroughly established by all of the decisions of the Federal Court. And, indeed, in many of the cases it is simply referred to with a citation of the authorities

without discussion. Because, in certain of the earlier decisions the courts declared that rates fixed by commissions or boards were improper, because they compelled the corporation to operate at a loss, or under such circumstances as permitted only a very small per cent of earnings upon the capital actually invested, the opinion has arisen in some quarters that a public service corporation is entitled in any event to earn a fair return upon the amount of capital which it has invested in its business, and that this is the sole test of whether or not a rate is so unreasonable as to be confiscatory.

This, indeed, seems to have been the idea of both the complainant and his Honor, the trial judge, for the complainant has confined itself in its proof exclusively to showing what percentage upon its capital stock the rate prescribed by the Memphis Legislative Council would permit it to earn, and the trial judge has, in deciding the case, based his opinion wholly upon the fact that the rates prescribed would not allow what, in his opinion, was a fair return upon the amount of capital stock of the corporation.

The theory underlying rate regulation, however, would be entirely destroyed if any such doctrine should be established as the one contended for in the opinion rendered in this case below. A railroad company or other public service corporation which takes upon itself the burden of discharging some governmental function is not, as a matter of course, entitled to receive a fair return upon its investment. The rule upon that subject is well laid down by Mr. Justice Brewer in *Cotting v. Kansas*, etc., 183 U. S. 79, as follows:

“The owner expresses his willingness to do the work of the state, aware that the state, in the discharge of its public duties, is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger public interest. At any rate it does not perform its service with the single idea of profit. Its thought is the general public welfare. If in such case an individual is willing to undertake the work of the state, may it not be urged that he, in a measure, subjects himself to the same rules of action, and that if the body which expresses the judgment of the state believes the particular services should be rendered without profit, he is not at liberty to complain. While we have said again and again that one volunteering to do such service; cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its

use to such rates as do not pay the expenses of the work, and, therefore, create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state, he must submit to a like determination as to the paramount interests of the public."

An equally strong declaration was made in the case of Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, as follows:

"It cannot be said that a corporation operating a public highway is entitled as of right and without regard to the interests of the public to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are entitled to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and consequently a diminution in the tolls to be collected, that is not, in itself, a sufficient reason why the corporation operating the road should be permitted to maintain rates which would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order that the stockholders may earn dividends. \* \* \* If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune, which the constitution does not require to be remedied by imposing burdens upon the public."

Neither of these decisions has been overruled by this Court, and they cannot be unless a different cause for permitting rate regulation is found by the courts.

The entire theory of railroad rate regulation is that the rates must be reasonable, not to one party, but to two parties, viz., to the public service corporation and to the public which it serves.

The theory upon which the state is permitted to regulate public service corporations at all is that they are engaged in



discharging a governmental function, and have been vested with governmental rights such as eminent domain, and the use of public roads and highways, and that they must, therefore, serve the public at reasonable cost, and are allowed to charge only what the service furnished by them is reasonably worth. The doctrine of *Smyth v. Ames*, 169 U. S. 466, is not a declaration that the corporation in any event is entitled to earn an interest upon its investment, as will be seen from the following excerpt from that opinion:

“It cannot, therefore, be admitted that a railroad company, maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests and ignore the rights of the public; but the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders.”

And, again, the Court says:

“What the company asks is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.”

This decision is, therefore, in exact accord with those above quoted in holding that the paramount question to be considered by the courts in all controversies over rate regulation is what is the fair valuation of the services rendered to the public. If the railroad company or other public service corporation cannot render the services to the public for such compensation as is the fair value of the services, then it is the duty of the corporation to render the service at a loss, if necessary, or else go out of business. That *Smyth v. Ames* was not considered as overruling or setting aside earlier decisions is proven in the case of *San Diego Town & Land Co. v. National City*, 174 U. S. 757, where the Court said:

“The contention of the appellant in the present case is that in ascertaining what are just rates, the Court should take into consideration the cost of its plant; the cost per

annum of operating its plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company over and above such charges for supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration and such weight be given them, when rates are being fixed as under all the circumstances will be just to the company and the public. *The basis of calculation suggested by the applicant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration.*"

So, also, in the still later case of Minneapolis & St. Louis Railroad Company v. Minnesota, 186 U. S. 257, the Court again declared that the question of the value of the services to the public is the real guiding star in all rate regulation cases. The Court says:

"Each case must be determined by its own considerations, and while the rule stated in Smyth v. Ames is undoubtedly sound as a general proposition that the railroads are entitled to a fair return upon the capital invested, it would not justify them in charging an exorbitant rate in order to pay operating expenses, if the conditions of the country did not permit it."

One of the cases which is frequently cited as holding the contrary rule does not, upon examination, bear out the contention of those who insist that the corporation is, at any event, entitled to interest upon its money. Although the Court did decide in Regan v. Farmers Loan & Trust Company, 154 U. S. 362, that the rates fixed by the commission in that individual case were too low, and could not be sustained, it used this language as part of its opinion:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable."

The question of the reasonableness of a rate involves the element of reasonableness both as regards the company and

as regards the public. They must both be considered when the rate is to be investigated.

Chicago, M. & St. P. R. R. v. Minnesota, 134 U. S. 450.

It is always considered that the public has a right to demand that the rate shall be fair.

Chicago, M. & St. P. R. R. v. Tompkins, 176 U. S. 167.

Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201.

This doctrine, indeed, is, when properly considered, one of the fundamental principles of rate regulation. The public service corporations which are carrying out functions properly governmental, and which the state allows them to exercise merely as a matter of convenience, must, under all circumstances, furnish the service to the public at a reasonable price, and this reasonable price is to be what the service is properly worth to those to whom it is rendered. This is the only theory upon which the state has any right to interfere. Of course, where it is possible, a fair return should be allowed to the corporation upon the money it has actually invested in its business, but the fact that the corporation is operating with a slight gain or even loss does not allow it to charge a rate which is too high for the service which it gives.

Chicago & N. W. R. R. Co. v. Dey, 35 Fed. 866.

In other words, the government being allowed to regulate rates in order to protect the people, the protection of the people is the first governmental consideration. When we investigate the subject of rate regulation upon any other basis, we are bound to reach illogical conclusions.

Would it be seriously contended, for example, that if a railroad were built through a sparsely settled region so it could not render enough service at a proper compensation from which to make up a fair return on its value, that the misfortune should not fall upon those who invested their money unwisely? Would such a railroad be permitted to extort from those who patronize it in order that its stockholders might earn dividends? It is true that if a railroad were so built that it could earn enough at a fair rate to make large dividends for its stockholders, this is not a consideration for the state. If a railroad has been built with judgment so that it is, by charging a fair rate to the public, enabled to make large dividends for itself, it is entitled to the benefit of its

good judgment. If it is so constructed, on the other hand, that it cannot, by charging a fair rate to the public, make any profit at all, then it must suffer the consequences of its ill-advised action. In short, the question of the earnings of the railroad is the secondary consideration, and so it is with any other public service corporation. They must equip themselves in such a manner as to be able to give to the public proper service at proper rates, and when this is done, the state cannot interfere, either to allow the corporation to raise its rates, or to compel it to lower them.

This rule applies most clearly in the case of railroad rate regulation, as will be noted from the cases cited above. In the litigation resulting from such regulation, practically all of the cases have been decided by the Court to the effect that the obligation of every railroad to the people is to give them a safe and proper service, and that the people are obliged to pay for such service what is a just compensation. The governmental duty is confined wholly to seeing that these reciprocal obligations are carried out. A government possesses jurisdiction over properties devoted to the public use, and should have the power to control the method of their employment, and prevent the public from suffering from extortion, but when a rate is granted that is reasonable to the public, the theory of protection ceases, and the government cannot seek to penalize that company which is making large profits for the benefit of those who are not.

When we come, therefore, to consider the question of a reasonable rate the value of the property of the railroad company, the amount of money it has invested, the cost of any reproduction of its line, all these are merely evidential facts to aid and guide the Court in determining what is a fair and reasonable charge for the services rendered. The real consideration, however, in every case must be the value of the service to those who are called upon to pay for it.

It is only upon the theory above set out that all of the decisions of the United States Court are reconcilable, and we earnestly insist that the principles above enumerated are not only logical, but are supported by decisions of this Honorable tribunal.

In *Cotting v. Kansas*, *supra*, where the state sought to lower the charges of the stock yards upon the theory that it was making large earnings, the Court held that this was not permissible, the only question at issue being what were fair rates to the public.

On the other hand, we have never been able to find a case, and do not believe that they exist in the books, which holds that a corporation is entitled, in order to pay an interest upon its investment, to exact from the public a charge which is out of proportion to the value of the services which it gives. In that event, all of the mistakes of mismanagement, all of the reckless extravagance of promotion, of watered stock, etc., would fall, not upon those who should suffer, but upon the innocent public.

We feel, therefore, safe in announcing that where a corporation complains that a rate fixed by a board is so unreasonable as to be confiscatory, it must show more than the mere amount of its capital stock and the percentage of earnings thereon. In all fairness it ought to prove two things, (1d) what is the reasonable value of the service rendered by it to the public, and (2d) what is a fair return to it upon the amount that it actually has invested in its plant; that is, upon the real value of the plant.

We have already shown that the reasonable value of the service rendered by the public service corporations to the public does not necessarily mean that the service is worth to the public such a sum as will enable the corporation to earn a fair return upon the money which it has invested.

What, then, are the other considerations which should determine what is a reasonable rate to the public? Clearly it would seem that the rates given by like corporations to similar communities would be a fair index of what the rates in Memphis ought to be. In other words, if in cities which have the same or a greater number of telephones, the rate charged citizens for telephone service is higher than that called for by the ordinance, this would certainly be an index that the rates prescribed by the ordinance are too low. This proposition, indeed, was considered by Mr. Justice Brewer in the case of *Cotting v. Kansas*, etc., 183 U. S., p. 79, where the Court said:

"It may be said that the conclusion of the Court was directly against the plaintiffs, and, therefore, was a decision against all of their contentions. It was found, however, that the charges made by the defendant were no greater (and in many instances less) than those of any other stock yards in the country. Nothing is stated to outweigh the significance of that finding. While custom is not controlling, for there may be a custom on the part of all stock yards companies to make excessive charges,

yet in the absence of testimony to the contrary, a customary charge should be regarded as reasonable and rightful. In Gunning's Law of Tolls, p. 61, the author says: 'Long usage and acquiescence in one uniform payment for toll is undoubtedly cogent evidence that it is reasonable.' "

In this case the stock yards were complaining of rates assessed against them, and it was held by the Court that the rate charged for the slaughtering of cattle at other centers was very strong evidence of what was a reasonable and fair one in Kansas City. This is certainly logical, for, if the experience of other communities is to have no weight with the Court, there is no real test by which the value of the service can be determined except upon figuring the percentage upon the amount actually invested. This would prevent the public from securing the benefits of care and skill in the construction of public utilities, and make them bear the burden of unskillfulness and waste.

In the opinion of Mr. Justice Brewer, above quoted, he also cites with approval the case of *Shepherd v. Payne*, 12 C. B. N. S. 414-433, quoting from Willes, J.:

"A fee need not be of a fixed and ascertained, but may be of a reasonable amount, and exercising the power conferred upon us by the case to draw inferences of fact, we may conclude that if the claim can be sustained in point of law, it was, in fact, for a reasonable fee. If so, then looking to the amount established for *similar services by other officers* and remembering what fees have been paid and received within the memory of us all in the courts of Westminster Hall, and at the Assizes, we think there can be little doubt that the fees in question, so far as amounts are concerned, are, in fact, reasonable."

The justice says further, in quoting from *Louisville E. & St. L. R. R. v. Wilson*, 119 Ind. 352:

"The law makes it the duty of every common carrier to receive and carry all goods, and authorizes a reasonable reward to be charged for the services. The amount to be paid is in a measure subject to the agreement of the parties, but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly or customarily paid for other like services. John-

son v. Pensacola & P. R. Co., 16 Fla. 623; Angell on Carr., Sec. 392; Lawson on Carr., Sec. 125."

This doctrine of the Court has not, so far as we have been able to ascertain, been modified or overruled, but has, on the contrary, been approved by subsequent decisions.

That the experience of other companies as well as the complainant is a proper matter to be shown was urged upon this Court in *Wilcox v. Consolidated Gas Company*, 212 U. S., p. 19, and it was one of the factors considered by the Court in arriving at its conclusions. Such, also, was the rule in *St. Louis & San Francisco R. R. Co. v. Gill*, 156 U. S. 657, where it was held that the complainant should show the experience of other companies as well as of itself. To like effect is the decision in *Tenement House Department v. Moeschler*, 89 App. Div. 538 (85 N. Y. Sup. 704, 179 N. Y. 330).

It would seem clear that with all the facilities at their command, the telephone company should have been able to show why the Memphis rates ought to be higher or different from those of other cities similarly situated. It certainly cannot be true that the divergence between Memphis and the other cities is so great that no basis of comparison could be obtained.

The complainant below, however, certainly did not consider itself under any obligation to show what rate was reasonable to the public by making a comparison with other cities. If such obligation rested upon it, and it seems clear from our third rule (C—supra) that it does, then the complainant utterly failed to make out its case and was not entitled to the relief sought.

We believe that it is clearly established that the complainant must show that the rate was unreasonable, and we feel that it is equally certain that in order to do so, it must show that the rate is one which gives the public a service on a lower basis than it is properly entitled to. Now, search through the record from beginning to end, and there is not a scintilla of evidence introduced by the complainant in chief to show that the reasonable value of the service is in any other method than by establishing the capitalization of its plant, and the return thereon. If it is under the obligation which we have above contended for (1d) to show what the service is reasonably worth to the public, irrespective of the return upon its investment, it has utterly failed to make out its case.

The City of Memphis has introduced, however, upon its part, proof to show what telephone rates were in other cities of



approximately the same size as Memphis, and where the conditions were approximately the same. It will be remembered that the City of Memphis was under no obligation to make this proof, but had the right to rely upon the presumption in its favor, and wait until the complainant had shown by competent evidence that the rate granted in Memphis was as low as the citizens were entitled to.

This proof appears in the record at pages 210-211, in the form of certain tables showing the rate of business telephones per annum, the rate of residence telephones per annum, and the number of subscribers in various cities throughout the United States. The tables are as follows:

	Bus. Rates Per Annum.	Res.	Sub- scribers.
Albany, N. Y. ....	48	24	3,500
Atlanta, Ga. ....	42	30	....
Birmingham, Ala. ....	36	18	3,300
Buffalo, N. Y. ....	48	36	7,600
Chicago, Ill. ....	85	(Bus. Phones only)	10,000
Columbus, Ohio ....	40	24	6,000
Cleveland, Ohio ....	72	48	15,000
Dayton, Ohio ....	40	24	4,000
Elmira, N. Y. ....	36	24	4,230
Elizabeth, N. J. ....	36	30	....
Erie, Pa. ....	40	28	2,300
Fall River, Mass. ....	36	24	1,200
Fort Wayne, Ind. ....	36	24	3,250
Grand Rapids, Mich. ....	26	24	6,200
Harrisburg, Pa. ....	36	21	....
Indianapolis, Ind. ....	40	25	9,000
Jackson, Mich. ....	30	20	2,300
Kansas City, Kan. ....	54	48	11,000
La Crosse, Wis. ....	30	24	1,500
Lafayette, Ind. ....	30	20	2,000
Lincoln, Neb. ....	36	21	2,500
Los Angeles, Cal. ....	48	24	16,000
Louisville, Ky. ....	48	30	8,000
Memphis, Tenn. ....	48	30	3,500
Minneapolis and St. Paul, Minn. ....	48	30	14,000
Mobile, Ala. ....	30	20	600
Muncie, Ind. ....	30	18	1,600
Philadelphia, Pa. ....	80	48	16,000
Pittsburg and Allegheny, Pa. ....	72	58	15,000
Portland, Me. ....	42	24	2,500

Racine, Wis. ....	30	18	2,100
Rochester, N. Y. ....	40	30	7,500
Savannah, Ga. ....	40	25	....
Scranton, Pa. ....	36	24	....
Seattle, Wash. ....	48	36	6,500
San Antonio, Texas ....	36	24	2,500
St. Joseph, Mo. ....	40	30	....
Syracuse, N. Y. ....	36	24	2,500
Toledo, Ohio ....	48	30	9,000
Topeka, Kan. ....	36	24	2,800
Trenton, N. J. ....	36	24	3,000
Troy, N. Y. ....	40	30	2,200
Wilkes Barre, Pa. ....	28	24	....
Wilmington, Del. ....	36	24	....
York, Pa. ....	48	24	2,500
St. Louis, Mo. ....	72	48	13,000

The said Exhibit C likewise shows as follows:

The Bell Company has in force the following rates in the cities set out below; the number of subscribers also placed opposite each city:

	Subscribers.	Bus. Rate per Annum.
Philadelphia .....	40,000	\$60.00
Pittsburg .....	18,000	55.00
Cleveland .....	25,000	84.00
Grand Rapids .....	3,000	30.00
Indianapolis .....	6,500	45.00
Syracuse, N. Y. ....	6,500	40.00

His Honor, the trial judge, swept aside this evidence of the city upon the theory that the telephone company was entitled to earn, in any event, a fair per cent upon the capital invested, and, therefore, the rates and conditions in other cities were immaterial. This, we think, in the light of the decisions above quoted, was clearly and unmistakably error. If the rates in other cities are lower than those in Memphis, certainly that creates a presumption that elsewhere the people are receiving the service at what it is reasonably worth, and that in Memphis they are paying more than they properly should for what they receive.

When it is remembered that the city was not under obligation to show that its rates were reasonable, the significance of these tables of rates is very apparent. There was already resting upon the complainant the burden of showing the rates were unreasonable. A presumption was created in favor of

the validity of the ordinance by its passage. The introduction of these tables accordingly tended to increase the presumption, and make it the duty of the telephone company to show in the clearest manner that the rates prescribed by the ordinance were improper. In the face of these tables, therefore, it would seem the duty of the complainant to show that the conditions elsewhere were different, and to point out the particulars wherein they were different, in order to justify a higher rate in Memphis than was charged in other cities.

At this point we desire to call the Court's attention to a peculiar, but apparently well established doctrine in the telephone business which this Court has already spoken of in the case of *Railroad Commission v. Cumberland Telephone & Telegraph Company*, 212 U. S. 414. That is, that in the telephone business, the cost of doing business increases with the number of connections, so that after a reasonable number of telephones have been connected, the expense of maintenance of the exchange is greater per telephone for the added telephones than it was for the original ones. In other words, instead of its costing less in proportion to each connection to handle an exchange of five thousand telephones instead of one of twenty-five hundred, it, in reality, costs more per connection to handle the one with the larger number of telephones.

Therefore, when we find from the table that Cleveland, Ohio, with 15,000 connections enjoys a rate of \$72.00 per annum for business telephones, and \$48.00 per annum for residence telephones, it is clear that it is much better off in the matter of rates than Memphis. Upon the basis of the number of connections, the Cleveland rate should be very much larger than that charged in Memphis, instead of being, as appears, actually less. Indeed, the telephone company gives as a reason for its constant increase of rates in the City of Memphis from 1903 up to the time of the bringing of this suit in 1907, the additional number of telephones connected with the exchange, and judging from the increased rates which have been imposed upon the Memphis public in proportion to the growth of the exchange, the Cleveland rate should be somewhere in the neighborhood of \$100 per year if it grew as rapidly as the Memphis one.

Probably the most pertinent example, however, is that of Kansas City, where, with 11,000 connections, or nearly 4,000 more than the City of Memphis, the rate for business telephones is only \$54.00, and that for residence telephones \$48.00. So, also, Los Angeles, Cal., with 16,000 telephones, has a rate of \$48.00 for business telephones and \$24.00 for residence ones.

At Louisville, Ky., the rate is \$48.00 for business telephones, and \$30.00 for residence telephones, with 500 connections more than there are in the Memphis exchange. In Minneapolis and St. Paul there is a rate of \$48.00 for business telephones and \$30.00 for residence telephones, with 14,000 telephone connections.

An examination of the schedule shows lower rates than those of Memphis in practically every instance where the number of connections is as great or greater than that furnished to the defendant.

After the City of Memphis had introduced this proof, the Cumberland Telephone & Telegraph Company endeavored by retaking the deposition of its president, Mr. James E. Caldwell, to show that the conditions elsewhere were not the same as those in Memphis. Mr. Caldwell does not endeavor to show how these differences existed, nor does he in fact establish his own qualifications as a witness to any difference of conditions. When he is asked as to his competency to testify as to the values of telephone service elsewhere, and the reasons why there are lower rates offered to other cities than there are to Memphis, he bases his qualifications as a witness upon matters of purely general information. Note his question and answer (Record, p. 312):

“In your direct examination, you have testified regarding certain independent telephone companies in the cities of Atlanta, Chicago, Columbus, Ohio, Louisville, Ky., Indianapolis, Memphis, Tenn., Rochester, N. Y., and Trenton, N. J. I will ask you how you secured the information which you have given?

A. In various ways that men do with regard to matters affecting their business. What appeared in the public prints, private correspondence and in interviews with people who are familiar with and in the active conduct of affairs; official court notices and reports and in various ways and in so many ways, one circumstance proving up another, that it leaves me no room to doubt the correctness of my information. In other words, I have endeavored in every way to satisfy myself of the truth of the matter, and I feel I am in position to know that the information which I hold is thoroughly accurate and reliable.”

In other words, Mr. Caldwell, having satisfied himself that he was competent to testify, feels that the matter is settled. The rule, as we had always thought, in the matter of expert

witnesses, is that the witness must always satisfy the Court as to his capacity to testify on matters which do not come under his personal observation. Certainly, Mr. Caldwell has shown that his knowledge of conditions elsewhere is clearly hearsay evidence, and entirely inadmissible.

Mr. Caldwell further says (Record 312):

"I assert it as a fact that I am familiar with what I am talking about, and I have not a waver in my mind about it. In other words, I am as thoroughly satisfied of the truth of what I am saying as I am with reference to any other fact that I might give testimony concerning. In other words, there is not a lingering doubt with regard to the truth of the statements that I am making."

Certainly, if Mr. Caldwell is so sure in his own mind of the truth of all he is testifying about, he ought to be able to refer the Court to tables or to matters which would bear out his statements. He should have well authenticated reports and actual personal experience in order to be willing to swear definitely and positively about these matters. Throughout his testimony, however, it appears he has no such accurate and detailed knowledge.

Mr. Caldwell insists in his deposition that the companies which are giving these low rates in Indianapolis, Columbus and Louisville, are endeavoring at the present time to advance the rates (Record 523). He also claims that in some of the other cities the companies which are giving these low rates are not at all to be considered in the class of his corporation. But it signifies much that with all of the mass of information at Mr. Caldwell's disposal, he utterly overlooks some of the cities on the list where the variation between his rates and those of the other companies is most notable. As to Los Angeles, California, he says nothing, and it has 16,000 telephones, and a \$48.00 business rate and \$24.00 residence rate. As to Minneapolis and St. Paul, with 14,000 telephones, a \$48.00 business rate and \$30.00 residence rate, he is equally silent. Nor does he explain why Toledo, Ohio, with 9,000 telephones, is able to charge a rate of \$48.00 and \$30.00 for business and residence telephones, respectively. For some reason, also, the City of St. Louis, with 13,000 telephones, and a business rate of \$72.00 for business telephones, and \$48.00 for residence telephones, is also overlooked. We may assume with all the fund of information Mr. Caldwell could have supplied himself with and claims to already possess, he could have testified personally and

positively to all of these matters. He is certainly far from an unwilling witness and if he had any sort of reason why the Memphis rate should be higher in proportion than those of the cities just mentioned, he would have certainly given it to the Court. It is therefore, certain that in all of these cities the rates in operation were not only actually lower, but when the proportion of telephones in use is considered, nearly 50 per cent lower than those in operation in the City of Memphis. For this condition the complainant has no explanation to offer.

Nor are the reasons given why other cities have lower rates at all conclusive. Throughout Mr. Caldwell's deposition, his idea is that wherever independent telephones exist, it is enough to say that the line is an independent one, and, therefore, can charge lower rates.

He also says in regard to the line in Detroit, Michigan (Record, pp. 313-314), that a Bell Telephone Company in that city charges rates which are proportionately much lower than those in the City of Memphis, but he says that this was due to the fact that there was competition in Detroit, and that both of the companies are in bad financial shape. From a careful reading of Mr. Caldwell's deposition we are forced to this conclusion, that wherever the Cumberland Telephone & Telegraph Company has opposition, it gives lower rates proportionately than those which are charged to the citizens of Memphis. He, indeed, states that certain rates are based upon the fact that the competition in those cities is particularly keen.

This is practically an admission that the Memphis rates which the ordinance sought to reduce were unreasonable. The public is at all times entitled to have just such rates as competition and independent lines would cause to exist elsewhere. If it be true that telephone companies can, under the spur of competition, reduce rates considerably, or if independent lines are able to give lower rates and continue in business, these reduced rates are what the services can reasonably be supposed to be worth. In other words, a suppositious competition can always be supposed to exist when a question of rate regulation is brought before the courts. The public is entitled to have the benefit of those rates which the company can and does give under the most favorable circumstances, or rather under the greatest pressure from competitors.

Mr. Caldwell, however, admits that all of the independent companies can and do give lower rates than those which the Bell Companies—of which the Cumberland is one—allow their patrons.

If this is the case, and the independent companies are able to continue in business and to furnish the public with service at rates which the Cumberland cannot meet, then certainly the independents are giving reasonable rates as opposed to unreasonable tariffs on the part of the Bell corporations, and the latter should go out of business. They are trying to do just what this Honorable Court said in Turnpike Co. v. Sanford could not be done. Hampered by royalties to their parent company, the trust exchanges cannot furnish the service at a proper rate. Are they, then, entitled to exact from those who use their lines an unreasonable and unfair charge in order to earn dividends? Clearly not, unless this Court overrules its former holding.

Mr. Caldwell insists that all of the independent companies are going into bankruptcy, and declares that the Detroit line has already reached that condition (Record, p. 314).

In the light of that statement, the following evidence is very significant:

“State when all this transpired that you have just spoken of (referring to bankruptcy).

A. Within the last three years?

Q. This Exhibit No. 1, from which I am reading, purports to be a compilation of rates on September 3rd, 1907; state whether or not the rates which I have just read as being correct on that date have been changed since this publication?

A. Not to my knowledge; I think not materially.

Q. On the date of this publication on page 186 thereof, Home Telephone Company in Detroit, Mich., had rates quoted as follows: Business direct line, unlimited service, \$60.00 per year; residence, \$40.00; state whether or not that is correct?

A. I have not a doubt of the correctness of it.” (Record 314.)

From this it is clear that whether the Detroit Company has been reorganized or not, it was still furnishing service at the time of the trial of this suit at rates much less than the Cumberland Company was offering to its patrons in the City of Memphis. We must, therefore, take the witness' inferences that all the telephone companies, other than the Bell, were



seeking to increase their rate, with something of caution. In this instance, certainly, it is shown that Detroit is still enjoying a reasonable rate of service, and we can presume that other cities are doing likewise, in spite of the insolvency which Mr. Caldwell states has already caught them, or is hovering over them ready to swoop.

Certainly, Mr. Caldwell ought to be thoroughly familiar with the conditions in Memphis at least, as he and his auditor both admit they have gone over the figures with reference to Memphis especially for the purposes of this suit. It appears, however, from the record that there was in existence at the time Mr. Caldwell's deposition was taken, an independent company which was actually furnishing to Memphians service at the rates which are called for by the city ordinance. Mr. Caldwell states that this independent company had not much business, and was not in good condition, anyhow.

It is a significant fact, in view of his decidedly unfavorable opinion of the Memphis Telephone Company, that it is at present in operation and doing business in Memphis, and what is more significant, still charging the same rates that are called for by the city.

Clearly, therefore, the foreboding of bankruptcy which the witness indulges, are to be taken in somewhat of a Pickwickian sense. There must be some other real reason why the City of Memphis is charged higher rates than other cities. Differences in taxation are not shown. The difference of conditions, if such exist, are not testified to at all. Indeed, when pinned down to it, the sole reason, other than those we have above stated, why Memphis is not entitled to the same rate as other cities with approximately the same number of connections, Mr. Caldwell states, is because in the City of Memphis certain public officials are furnished free telephones, and the City of Memphis is allowed to use one of the conduits for the fire alarm, and is given the privilege of placing the fire alarm wires upon the poles of the company. There are certain rough calculations in the record to show what it would cost the City of Memphis upon its part to install separately and individually this service, but what it actually costs the Cumberland Telephone & Telegraph Company to allow the City of Memphis the use of the conduit and poles is left to conjecture. We cannot really see how, unless these privileges granted to the City of Memphis are very costly to the grantor, they are to be considered in fixing a rate for the public generally.

It is evident, moreover, that all of the privileges given to the City of Memphis are under and by virtue of a compromise

entered into between the city and the defendant company for certain pole rentals which the city claimed to be due it from the telephone company. Clearly, therefore, the City of Memphis is entitled to all of the privileges which it received, and as these privileges are the result of the settlement of another claim, they ought not to be at all considered in the making of the company's rates at Memphis. If the company saw fit, instead of litigating a claim for pole rentals alleged to be due, to make certain concessions and furnish certain service, these concessions and furnish certain service, these concessions and service were matters which should have been properly charged up in gross against the expenditure of those years against which the pole rentals were being claimed. In other words, if the Cumberland Telephone & Telegraph Company had paid the rentals in cash, certainly it would not have been entitled to claim in subsequent years the right to increase its rates to recover back this sum. Therefore, instead of paying a lump sum, it granted certain concessions to the City of Memphis as a consideration for dismissing the city's claim for those pole rentals. Wherein do these concessions differ from the payment of a lump sum? They have really no place whatever in the question of what is a reasonable rate to the citizens of Memphis. Under its contract, the city has a right to claim this service in perpetuity, and the Cumberland Company is obliged to furnish it, no matter what the rate to the rest of the public may be. This contract is set out in full in the record at pages 58-9, and shows clearly that it is a compromise agreement, and that all of the service furnished the City of Memphis is under and by virtue of this agreement, as we have above set out.

The burden of the free telephones for certain city officials is not heavy in dollars and cents. From the record, p. 156, it appears that for the year 1907 the city service, if charged for, would have brought the company \$4,916.05. For all this amount, moreover, which is not covered by the contract, the company has made claim against the city, and is now threatening suit. What the amount of the service actually covered by the contract is does not appear.

It further appears that far from such services being an unusual burden under which the company is unable to exist, that in the City of Evansville, the Cumberland Telephone & Telegraph Company furnishes exactly the same concessions to the municipal authorities as it gives to the governing powers of the City of Memphis, and in addition the city receives 3 per cent of the gross revenue of the company as a sort of privilege tax or license. Under these circumstances, it is interesting to

note that the rates in Evansville are precisely those fixed by the city ordinance of the City of Memphis.

See the contract between the Cumberland Telephone & Telegraph Company and City of Evansville, record, pp. 213-14-15-16-17-18-19.

Another claim is made in regard to the maintenance of city wires, which it is said are practically kept up by the Cumberland Company. Granting this to be true, it has no bearing upon the case. It is a pure gratuity which is extended as a matter of courtesy and can be denied at any time. Politeness is not to be rewarded by the courts.

We feel, therefore, justified in the assertion that the complainant has utterly failed to show the reasonable value of the service rendered to the Memphis public. Mere assertions of its officers were certainly not enough. It was its duty to introduce such proof as would enable the Court to see from the evidence that the reasonable value of the service was greater than the rates fixed in the ordinance. It should have introduced this proof by its own evidence, as the burden of proof is placed upon it, and placed upon it to the fullest and most complete extent. When it failed to do this, and the City of Memphis increased the presumption of the unreasonableness of the existing rates by showing what the rates elsewhere were, it was certainly the duty of the company to rebut this evidence by the strongest possible proof. It offers to the Court what? The statements of its own president, who does not give the sources of his information, who does not show himself to be an expert, but insists that his evidence is entitled to the fullest weight because of his own willingness to assert it under oath.

Certainly the burden of proof, placed upon the complainant, has not been sustained. There is nothing from which this Court can say that the citizens of Memphis are being given proper and reasonable rates, and as this is absolutely essential in order to prove the rate unreasonable, we earnestly insist that the complainant has failed utterly in its duty, and that the relief sought below should have been denied.

The trial judge throughout acted upon the assumption that it was the duty of the City of Memphis to prove the rates in existence were unreasonable. Such is not the law. To prove the rates prescribed by the ordinance were unreasonable was the duty of the complainant, and in order to make out this proof, the fair value of the service to the public unquestionably should have been established. This fair value is not shown. It is left to hazard and chance, and this Court has repeatedly

decided where the proof is not sufficient to enable the decision to be made definitely, that the complainant's bill must be dismissed.

We have shown above that there are only two methods recognized in which reasonableness of a rate can be shown, viz., what is the fair value to the public, and what is the fair value to the corporation. The second of these is subservient to the first, and we believe that the complainant was under the obligation of establishing its case under the first proposition, which it has utterly failed to do. We feel, moreover, that under the second proposition it has entirely failed to sustain the burden of proof which was placed upon it, and are confident that an examination of the authorities, and the evidence introduced in the trial court, will bear out this contention.

It is true that numerous statistics are given by the telephone company to show that it is earning a very small per cent upon the money which it has invested in the Memphis exchange. The officials of the company testify that the total investment in the Memphis exchange was \$1,119,824, upon which the company earned in 1907 \$23,390.39, or 2.8-100 per cent, according to Mr. Smith, or 2.56 per cent, according to Mr. Caldwell (Rec. pp. 129 and 89). It is further shown that the change in rates would result in a decrease of \$25,767 annually in the company's revenues, and would, thereby, cause the company to do business in Memphis at a loss.

Is such a statement sufficient to prove that rates are unreasonable? Is it enough for a company to show the cost of its plant and the income thereof, without more? The decisions are clearly to the contrary.

The reasonable value of a property of a waterworks company at the time it is being used for a public service is the basis of determining whether the rates fixed by the board of supervisors is taking the property without just compensation.

Springfield Waterworks v. San Francisco, 124 Fed. 574.

The reasonable value of the property of an irrigation company at the time it is being used for the public is a more satisfactory basis for estimating the valuation on which the company is entitled to a fair return than the actual cost of the plant, the annual depreciation, etc.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439.

The fair value of the property of a water company furnishing water to the inhabitants of a city is the proper basis from which to calculate whether a reasonable compensation for its services is received from the rates fixed by municipal trustees to be charged for such service, and the amount of the capital stock paid in by stockholders, as well as the amount of the bonded or other floating indebtedness, and the interest payable thereon are immaterial factors.

Redlands L. & C. Domestic Water Co. v. Redlands, 121 Cal. 365.

Such was the rule followed by this Honorable Court in *Knoxville v. Knoxville Water Company*, where it was expressly decided that the original cost of the plant was not a criterion by which to determine its present value, nor was the amount of the stocks and bonds outstanding.

See 212 U. S., p. 1.

See, also, *San Diego Land & Town Co. v. National City*, 174 U. S. 739.

*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.

*Smyth v. Ames*, 169 U. S. 547.

*San Diego Land & Town Co. v. Jasper*, 189 U. S. 439.

*Stanislaus County v. San Joaquin & K., etc., Co.*, 192 U. S. 201.

In this last case, the Court says, after reviewing the authorities:

“To take the amount actually invested into consideration does not mean necessarily that such amount is to control the question of the rates, or other language would have been applied if it had been intended to express that opinion.”

In the late case of *Railroad Commissioners v. Cumberland Telephone & Telegraph Co.*, 212 U. S. 414, in which this same complainant was a party, the Court announced the rule for which we are now contending, and held that the company should show the fair value of its property employed for the public use. Clearly, therefore, a mere showing as to what a plant originally cost is not sufficient. It was the duty of the complainant to disclose to the Court by competent evidence what was the actual value of the property employed for public service in the City of Memphis, at the time of the litigation. There are various ways in which this can be done. They

might have appointed appraisers for this purpose or have had competent experts testify in regard to the matter. Such was the course pursued in Knoxville v. Knoxville Water Company, and in several other cases above cited to the Court.

The procedure was clear and plain. The decisions of the Court were unquestioned and thoroughly understood, and the complainant certainly could not well have been in ignorance of its duty in this regard. We feel, therefore, that the Cumberland Telephone Company has wholly failed to sustain the burden of proof placed upon it; that it has failed in the first place to show the fair worth of the service to the public, and, secondly, to establish the real valuation of its property employed in the public service. Under these circumstances, the trial judge really had nothing before him upon which he properly could pass judgment, and it was his duty to have dismissed the case for want of proof. Certainly it is easy for a complainant to show improper returns if it is allowed to place its own valuation upon its property, and to assume in every case its property is worth all of the money that has been put into it.

Even the evidence which complainant has introduced, taken upon its own basis, does not bear out all of its contentions, and establish the confiscation for which it claims. Upon its face it is true it shows all that the complainant claims for it, but if we are to consider the inferences which naturally follow from this evidence, and examine carefully the statistics which have been furnished, it seems clear that the company was earning at the time of this suit, in the City of Memphis, much more than they really have shown by their statements.

In the first place, the amount of the investment upon which they are entitled to earn interest is really much smaller than the \$1,119,524 which they claim has gone into the upbuilding of the Memphis exchange. It appears from the evidence of Mr. S. T. Carnes, from whom the original Memphis Telephone Exchange was bought, that the Memphis concern was originally capitalized at \$100,000. For 49 per cent of the stock of this corporation Mr. S. T. Carnes received \$43,200. He did not know what the parties holding the 51 per cent of the stock received, but presumed it was par, as that was what was offered him originally for his stock. These facts appear from the deposition of Mr. Carnes, which both parties agree is part of the record, and which is printed as a supplemental record.

It further appears that Mr. Carnes, when he sold the Memphis Telephone Company, sold it to E. B. Babcock of Evans-



ville, and Barton of the Western Electric Company of Chicago. These gentlemen thereupon disposed of their recent purchase to the Cumberland Telephone & Telegraph Company for \$220,000, 220 per cent of its original cost. It is significant to notice in this connection that both Messrs. Babcock and Barton were two of the original incorporators of the Cumberland Telephone & Telegraph Company in applying for its charters, and two of the members of its board of directors (Record 16-17).

It is, therefore, evident that in the amount which is charged up against the Memphis exchange there is at least \$120,000 worth of water which the Court can easily discover, even from the complainant's own evidence. This Honorable Court has, moreover, held that the purchase price is not the criterion of value, but the actual value must be found.

See *Dow v. Biedelmann*, 125 U. S. 680.

We are not furnished by the complainant with any itemized statement which gives the various sums expended in making up the grand total which is said to be the cost of the Memphis exchange, and it is fair to assume that if the company's own evidence, prepared by its own experts for the purpose of this lawsuit, shows upon its face a transaction in which the net profit to the parties involved was 120 per cent, that there would be many other equally large and profitable transactions disclosed if a full investigation was possible. Indeed, that there must be some things charged to the Memphis exchange other than those which are properly part of the present value of its exchange, or rather the original cost thereof, will appear from the examination of the table of rates and earnings of the various cities along the line.

If it were true that the Memphis exchange cost as much and realized as little as the company claims, good business would have long since led to its discontinuance. In the first place, the entire capitalization of the Cumberland Telephone & Telegraph Company is \$20,174,454, \$174,454 more than is authorized by its charter, a little discrepancy which is nowhere explained. The Memphis exchange is capitalized at \$1,119,824, or 5½ per cent of the whole plant. It is claimed that this exchange earns only 28-100 per cent, and as the net earnings of the company on its entire lines are a little over 9 per cent, Memphis would appear to be in a most horrible condition, whether the rates were changed or not.

But Exhibit 8 of H. B. Smith's deposition shows that none of the cities on the line of the Cumberland Telephone & Tele-



graph Company are earning anything like the per cent made by the company as a whole. Louisville earns nothing at all. New Orleans, 3 68-100 per cent; Nashville, 5 52-100 per cent; Chattanooga, 6 14-100 per cent; Evansville, 4 92-100 per cent. All of the cities are, therefore, losing money as compared to the nine per cent annual dividends, the nearest one to that figure, Chattanooga, falling 2 86-100 per cent short of the mark. Now, two of these cities are larger than Memphis, and the other three are shown to have nearly as many telephones installed as Memphis, so that, if we calculate that each of these cities represents only 5 per cent of the entire system, instead of 5½ per cent, as represented by Memphis, the amount of capital invested in these cities would be 30½ per cent of the total capital stock. In other words, nearly one-third of the capital stock is earning less than 9 per cent, and is, in fact, yielding an average of only 3 89-100 per cent. This is very significant, for it shows that the remaining 69½ per cent of the stock is earning 11¼ per cent.

But when we consider certain other figures furnished upon other occasions by the Cumberland Telephone Company, we see a still more remarkable condition of affairs. In the suit of Railroad Commissioners v. Cumberland Telephone & Telegraph Co., 212 U. S. 414, it appears that the entire investment of the Cumberland Telephone & Telegraph Co. in Louisiana in 1907 was \$5,394,154.43. We have seen that in our figures above, New Orleans was presumed to have only 5 per cent of the total capitalization of the company invested in its plant. This would leave \$4,306,929.43 invested in the rest of the State of Louisiana. Upon this sum the company testified that it was earning less than 6 per cent. This, added to the 30½ per cent which we have above shown, is earning only 3 89-100 per cent, makes \$10,370,136.68 of the capital stock of the company which is earning less than 6 per cent per annum, when the whole system is totaling 9 per cent, or in excess of that amount.

A little arithmetical calculation is interesting. The total earnings from all the cities shown in the tables would be \$235,618.76, and the total earnings from the entire Louisiana plant, outside of New Orleans, figuring it at 6 per cent—more, by the way, than the company officials testified it had ever earned—would be \$258,416.36. In other words, Louisiana and all of the cities are earning \$494,035.13. More than half the capital stock is thus invested, and as the total earnings of the company are 9 per cent, or \$1,815,700, it is evident that less than half the lines in value must be earning \$1,321,625. This would be an earning rate well in excess of 13 per cent. It will be remem-

bered in these calculations we have given the company the benefit of every doubt, and have scaled the figures in its favor, rather than padded them against it. It is fairer, therefore, to suppose that the rest of the system calculated upon the company's own figures would really show almost 15 per cent net to the company.

If this were true and the telephone exchange at Memphis was earning 28-100 per cent, as opposed to  $13\frac{1}{4}$  to 15 per cent, gained by the rest of the system, would a business corporation operated for profit maintain for a single week a venture as unprofitable and as great a drag upon it as the Memphis exchange would be? Certainly not. There must, therefore, be some explanation of the figures given by the officials of the company. There must be some reason why the non-paying city exchanges are maintained. Either they are part of the general system, and are exceedingly valuable to it, or the method by which the earnings of the entire system are calculated is radically wrong in some respects.

Of course, we would not care to infer that the calculations as to Memphis are intentionally wrong, however suspicious they may appear. Let us see if there is any reason why the company could afford to maintain the Memphis exchange at a real loss.

The answer is found in the testimony of one of the company's own employees. It is the long distance business, with its heavy tolls, which really pays the company (Record, p. 133). And it is the cities which furnish the long distance business, and really make the company a possibility. Unless they maintain the city connections, the president of the company admits that it could not exist (Record, pp. 132-133). It seems that the company can even afford to maintain a city exchange that yields nothing at all—for it is maintaining such an exchange at Louisville, Ky.—in order to secure the long distance business which such an exchange would bring to the rest of the system.

When, therefore, the fair returns from the city exchanges are figured, they should certainly be given a liberal allowance on all the long distance business. Memphis, however, with its \$1,119,824 of capital, is credited with only 15 per cent of the business which originates in the Memphis exchange. Memphis makes the long distance business in the Memphis territory a possibility. It increases the long distance tolls by adding to the number of subscribers, and yet it is allowed nothing for calls which are made from the outside upon the Memphis system, and only 15 per cent of those calls for which it is

absolutely and directly responsible. *It is easy to figure out confiscation in this manner.*

By a similar system, a railroad could justify a higher rate for a haul of two miles than one for 100 miles, if the smaller stretch embrace a bridge or other expensive structure indispensable for the entire system.

It would certainly seem that as the object of the company is to increase its city service in order to feed the long distance lines, and as it is admitted the Memphis exchange is increasing rapidly, and lower rates would increase the service, the regulations proposed by the city would be reasonable unless in some way the usual current of events is to be reversed and the increased city service made to decrease the long distance calls.

The company has endeavored to violate the well known rule as established by this Honorable Court, to the effect that a company cannot claim to earn a net income on every portion of its line, provided that the line as a whole is a paying proposition in spite of the reduced rates. In the case of *St. L. & S. F. R. R. Co. v. Gill*, 156 U. S. 649, the Court says at p. 665:

“It, therefore, appears that the allegations made and the evidence offered did not cover the company’s road as an entirety even in the State of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts we agree with the views of the Supreme Court of Arkansas as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant’s entire line, and not upon that part which was formerly a part of one of the consolidated roads; that the company cannot claim a right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would prove unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with the others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of justice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all of its legitimate expenses under the operation of the act within the limits of Arkansas.”

See, also, *Missouri Pacific R. R. Co. v. Smith*, 60 Ark. 221, where it is declared that a rate is not necessarily unreasonable because it is unremunerative on a certain portion of the line.

In accord, see:

*Re Auburn & W. R. R. Co.*, 37 App. Div. 162.

*Morgans L. & T. Co. v. R. R. Com.*, 109 La. 247.

*Pensacola & A. Co. v. State*, 25 Fla. 310.

*People ex rel. v. St. Louis, A. & T. R. R.*, 176 Ill. 512.

*Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.

Such a theory, moreover, is inconsistent with good sense and sound judgment. A railroad company running into a city, and conducting a suburban service, could not charge the city and suburban service with the entire cost of the handsome terminal station, and thereby justify for such service an enormous charge as compared to the service to distant points, upon the theory that each portion of its line should earn a fair dividend. The railroad station is as much a part of the entire system as the rails entering into the city, or in a like manner, the Memphis exchange is a part of the entire system of the company. Its function is to act as a feeder for the other lines to draw business from, and give business to the rest of the system, and thereby make the existence of the company a possibility. Therefore, it is an unfair, unjust and inequitable policy to merely consider the cost of the plant at Memphis, and to hold that the company is entitled to demand a fair return upon the amount which it has invested at Memphis.

In several recent cases this Honorable Court has considered this phase of the question of rate regulation.

*See Atlantic Coast Line R. R. Co. v. State of Florida*, 203 U. S. 256.

*Seaboard Air Line R. R. v. State of Florida*, 203 U. S. 261.

The idea underlying rate regulation is this: Where a line is partly used for interstate, and partly for intrastate commerce, both of them being handled over the same rails, and over the same line, the company cannot be allowed to charge the entire value of the roadbed inside the state against the business over those rails done locally. Part of this cost should be charged to the interstate business, or part of the revenue from the interstate business allowed to swell the earnings of the local business. This Court has insisted upon such a basis of calculation wherever railroad rate regulation was involved.

In the case now before the Court, however, no part of the value of the Memphis exchange has been charged against the long distance business. Memphis is credited with a small percentage of the long distance receipts, but this percentage must go to earn dividends upon the entire cost of the plant. It would certainly seem that a fairer basis would have been to figure what part of the actual value of the Memphis exchange ought to be charged against local business, and what part against long distance business. In view of the net returns made from both, it would seem that the long distance should be compelled to bear a large part of the cost of the Memphis exchange, when, as a matter of fact, it pays none of it whatever.

It may be claimed that the estimates given above as to the proportion of the company's capital invested in cities is not absolutely accurate, as other cities have less capital invested than has Memphis. There is no proof, however, to this effect, and speculation is permissible, as the company's officials have given no figures as to other cities, and stated upon examination that they were not prepared to answer questions as to conditions elsewhere. The dense ignorance of the company's own auditor as to the conditions in his own town of Nashville is truly remarkable (Record, p. 131).

When we consider that the Louisville exchange is operated without any profit at all, possibly even at a loss, it seems to be less remarkable that the company is willing to maintain an exchange at Memphis that pays them 28-100 per cent upon its investment, and it becomes evident that the figures of the company in regard to its Memphis earnings are not placed upon a fair basis, and do not do justice to the business of the Memphis exchange. Certainly if Memphis is to be given a fair and just apportionment of its earnings, it ought to be credited with practically all of the long distance business originating in Memphis, and this would increase the earnings by nearly \$70,000, thereby showing that the Memphis exchange is a thoroughly paying proposition.

It is indeed a peculiar thing that the Cumberland Telephone & Telegraph Company at the same time that it was, through the Memphis courts, contending that it was in such a poor condition that it could not stand to give Memphis the rates which it had in operation elsewhere, was issuing a stock prospectus in which it set forth in glowing terms the beauties of the Cumberland Telephone & Telegraph Company stock as an investment for those who desired to make easy and certain money. In this statement, it is set up that the entire company

But there had been a strike in 1907; the company had been put to large expense in its efforts to win its contention against its employes, and, of course, 1907 would appear better as an expense producer. From these extraordinary causes, in fact, the legal expenses were increased nearly \$6,000. We are free to assume that additional connections with a company doing everything humanly possible (according to its contentions) to please the public do not increase lawsuits, and therefore the expense for this department in 1906 is certainly a fairer criterion than the extraordinary charges of 1907.

These figures appear in the record, p. 139. It further appears that for the year 1907 the incidental expenses occasioned by the operators' strike were also unusually heavy, and these incidental expenses amount to \$10,402 for the operating department alone during the year 1907. As Mr. Blair Smith states (Record, p. 139) that the largest part of this expense was meals furnished to employes on account of the strike, we are certainly right to suppose that at least 50 per cent of the expense was of an unusual character. This would further reduce the expenses of the Memphis exchange \$5,200. Incidental expenses are also charged under the head of general expenses, maintenance and reconstruction, but none of these have been considered in making this reduction.

From the record (p. 146) it also appears that the Memphis exchange is a truly wonderful institution. It is credited only with earnings made in the city limits, but is charged with the following traveling expenses:

General .....	\$1,302.39
Maintenance .....	8,838.55
Reconstruction .....	3,427.39

We do not understand how a local exchange can have any such enormous traveling accounts. If we assume that the fair proportion of the traveling done on maintaining long distance lines is chargeable to Memphis under the head of "General Expenses," something which seems to us wholly improper, still there is nothing to account for the other two items of traveling. In maintaining the Memphis exchange it certainly cannot cost more than \$8,000 moving about within the city limits. Nor can nearly \$3,500 be properly expended in reconstructing lines when all of this sum is used solely to move the employes from place to place. We believe the secret lies in the strike which we have already referred to. The traveling expenses, no doubt, were part of the cost of bringing employes from various other places to the City of Memphis in an endeavor to break the strike.



This Court has repeatedly held that all the items of expense must be shown to have been properly incurred in order to be allowable in an investigation concerning rates. We earnestly insist that we have here the following items which are not properly chargeable in this inquiry, because they are of an extraordinary character, showing the result of an unusual year, and of a year after, instead of before the suit was brought:

Excess legal expenses.....	\$5,734.40
½ Incidental Expenses of Operating....	5,201.00
Traveling Expenses, Maintenance.....	8,838.55
Traveling, Reconstruction .....	3,427.39—\$23,201.34

Upon any fair basis of calculation, therefore, the real net earnings of the Memphis exchange for the year 1907 should be figured at \$46,591.73, so that, granting the entire reduction in rates which it is claimed by Mr. Smith would result from the enforcement of the city ordinance, the net earnings of the Memphis exchange would be practically what they were in the year 1906, before the reduction went into effect.

It also appears that the majority stockholder in the Cumberland Telephone & Telegraph Company, to-wit, the American Bell Company, helps run up expenses by renting at \$1.78 per annum instruments which are worth only \$3.00, and which will last from six to ten years (Record, pp. 134-135).

The Bell Company, in fact, receives from the Cumberland 4½ per cent of all the gross revenues derived by the Cumberland from the use of the instrument. This would seem to be an exceedingly heavy tax in view of the fact that Mr. Caldwell testifies that all of the patents have expired, and that this service is paid for at so great a cost solely on account of the supervision and care which the Bell Company exercises over this subsidiary corporation. But the explanation of this condition is easy. The Bell Company owns 51 per cent of the Cumberland stock, and also controls the Western Electric Company, consequently the Cumberland Company pays 4½ per cent of its gross receipts to the Bell Company, and secures all of its switchboards and other apparatus from the Western Electric Company.

Will this Honorable Court consider that expenditures such as these are properly chargeable against the Memphis exchange?

Another matter which goes to reduce the Memphis receipts is the burden of expenditures for long distance lines. We have seen that the local exchange is very slenderly remembered



when it comes to distributing the long distance tolls, but it is a prime favorite in bearing the long distance expenses.

The local exchange pays all the operators for the long distance lines. Mr. Smith says:

“Q. The local exchanges bear all expenses of operators and for maintenance, do they not, along these lines?

A. Within that distance; however, they do not stand the depreciation charged on the strictly long distance lines.”

Mr. Smith had just previously explained that as long as any route carried both long distance wires and city exchange wires, it was considered under the domination of the local exchange. It is, therefore, possible by this system of calculation to charge the local exchange with the maintenance of the long distance wires for many miles outside of Memphis. Thus the Memphis exchange, compensating operators for the long distance lines, maintaining them for some distance outside of the city, furnishing them the field for operation, and making them a possibility, receives only 15 per cent of the money derived from these sources.

It further appears that this 15 per cent charge is really purely an arbitrary one adopted by the Cumberland Company in order to facilitate its system of bookkeeping. Mr. Smith says (Record, p. 133):

“Q. I base the supposition or question upon the idea that the long distance and local exchanges continue in operation, and ask you now which of these furnishes the largest amount of income on the investment?

A. You want to separate them entirely, and you want me to separate them and tell you what expenses are incurred in running the long distance, and what in running the local exchange.

Q. I want to ask you first which brought the revenue; if you wish to answer by separating them, you can do so?

A. I would have to answer that in this way: The earnings from the exchange business can be determined, and the earnings from the long distance can be determined, but the expenses in carrying on the two together are so interwoven, are on the same basis that a railroad company's passenger and freight business are on, that the same clerk will handle both classes of business, the same

operators will switch both classes; the same maintenance men will care for both of them; the same polls will carry both classes of wires, and as to telling you what the net returns from the total of the exchange business throughout the territory, and the total of the long distance business, I am unable to do it."

Being unable to tell what expense is chargeable against long distance, the company adopts the very easy expedient of charging it all against the local business.

It appears, therefore, that the company has unquestionably exaggerated a trifle in figuring the cost of its Memphis plant, and has made no effort whatever to give its present value.

The expense account has received the most careful attention and has been padded and rounded out in every possible way.

The earnings have been cut down by deducting practically all of the long distance tolls, although the local exchange is the cause of this business, and supports and maintains it. Certainly, therefore, upon a proper basis the local exchange is really a large earner of money, and a reduction of rates would still leave it with a good margin of profits.

But the company has not only been a little careless with its figures in these regards, but in computing the loss which would result from the new rates in Memphis, the calculations have been arranged in a manner that does not seem to the lay mind either proper or logical.

The company's contracts for telephone service are never made for more than one year at a time, and the rates can, therefore, be changed after the expiration of each annual contract. The company's auditor testifies that there were out of the 7,858 telephones in use in 1907, only 1,473 affected by the change of rates (Exhibit 6, H. B. Smith's deposition). Less than one-fifth of the system, therefore, is being conducted at rates higher than those fixed by the ordinance. Of course, if all of the rest of the system were upon the basis of the ordinance, and one-fifth were being operated at a higher figure, it is clear that the cutting of rates upon the 1,473 telephones affected would naturally impair the revenue of the company. But a large proportion of the remaining 82 per cent of the telephones were operated at a figure much less than the charges which the ordinance declared were reasonable and proper.

It is certain that with a maximum rate fixed by the city, it would be an easy matter for the company to place all tele-

phones upon the same basis, charging every one the maximum rate as soon as the existing contracts expired. As the exhibit to Mr. Smith's deposition shows, many business telephones were in use upon which the rate would have been more than doubled by the ordinance, and in some places the increase would have been even greater. It is, indeed, a significant fact, although it is unfortunately not in the record, that while this suit has been pending, the telephone rates upon the cheaper class of telephones in the city have been increased until all of them are now paying practically the rates fixed by the ordinance. This shows that the contention of Mr. Smith that the lower rates could not be raised to the figures fixed by the ordinance is incorrect and unsound.

It is true that the advance could not have been made to operate immediately, because the contracts had not expired, but at the conclusion of each contract, it would have been possible for the company to place all telephones upon the basis of rates fixed by the city ordinance. Mr. Smith states that some of the existing rates were the result of a telephone war; that others were due to conditions which had passed away, and, therefore, there was no valid reason given why all the telephones in the city could not be placed upon the same basis as to charges.

It is proper here to comment upon the fact that the telephone company claims to operate 7,800 telephones in the City of Memphis. The exhibits to Mr. Smith's deposition show that in order to make up this number of 7,800, it is necessary to count every extension as a telephone. That is, if for convenience, a business office has five desk telephones connected with one single instrument and a single wire, this office is credited with five telephones instead of with one. Indeed, in hotels, where each room is connected with a switchboard, it is credited with having as many telephones as there are rooms and individual transmitters. It is only by such a basis that the company has been able to run the number of subscribers in Memphis up to 7,800. This fact is particularly significant in view of the contract which the telephone company claims regulates rates in the City of Memphis, because it is only in case the number of telephones is in excess of 7,000 that a rate greater than \$1.00 per week per station can be charged by the telephone company. As will be seen when we come to consider the third contention made, the telephone company claims that it has more than 7,000 connections, and it says that these connections cannot all be placed upon the basis of full telephone rates, because, forsooth, they are not connections at all. We must, however, treat the 7,800 telephones as individual

stations throughout the entire case, or must not consider them individual stations in any part of it. The company cannot show both hot and cold. If it has 7,800 actual stations, in order to escape from the provisions of the contract, these 7,800 must be declared as being such telephones as could bear the maximum rate which the city ordinance prescribes.

We have heretofore shown in the brief that the proper basis upon which to figure the reasonableness of rates is not the cost of the exchange, but its value at the time when it is being used for the public service. The local company, however, did not adopt the correct method even of showing the cost of its plant, but assumed that all that was necessary was to show the money nominally expended upon the Memphis enterprise.

The cost of construction should have been shown in a proper manner, and by competent witnesses. The mere fact that upon the company's books certain sums were chargeable against the Memphis exchange is not sufficiently cogent proof of the cost of that establishment.

In *Stanislaus County v. San Joaquin & K. Cl. Co.*, 192 U. S. 215, the Court said:

"In this case much of the total amount expended in the course of the construction of the work was not proved by those who made such expenditures, and the items and the total amount of the cost of construction can be proved only by the company's books. What such books do not prove was the reasonableness of their cost, its propriety or necessity."

In this opinion the Court expressly states that the depreciation of the plant from all proper causes is first of all to be considered. The Court is then to figure whether, in constructing the plant, the work has been done with reasonableness and care, or with recklessness and incompetence. The company cannot expect to recover an income upon its own folly. So, also, in *San Diego Land & Town Company v. National City*, 174 U. S., the Court declares that the cost of the plant must be proven in a proper way.

The testimony given by the company's officials, however, shows that they have made no allowance whatever for the wisdom or lack of it displayed by their predecessors. Indeed, Mr. Caldwell, the president of the company, in testifying as to the reason why the Memphis exchange had cost more than the other exchanges, shows that this increased cost was due to the lack of foresight upon the part of the company's offi-

cials. He states that the Memphis exchange was always being changed—that it seemed to be on wheels—and that the company having placed its poles in the suburbs in improper positions, was constantly being compelled to remove and alter them (Record, p. 123). And all these expenses of these alterations, changes and removals were in every instance charged up against the Memphis exchange, and made a part of the capital invested in that exchange. It is shown, moreover, that the telephone business is still in an experimental stage (Record, p. 97). New methods of transmitting the messages, and various other patents and inventions are being constantly brought into the field, necessitating the discarding of old material and installation of new devices. The fact that certain of its equipment becomes antiquated is a misfortune of the telephone company, and ought not to be charged up against the public. And because, in order to keep its plant up to date, large forces of linemen and electricians and others are required, the company feels that it should be entitled to earn a dividend over and above all of these expenses.

It further appears that when the company bought out the original telephone company in the City of Memphis, that it charged up to the capital account the price paid by it for the Memphis Telephone Exchange without regard to the question whether or not this exchange was reasonably worth the amount paid for it, or only a fractional part hereof. In short, even with the meager material before us which is given by the testimony of the company's officials, it is clear that the Cumberland Telephone & Telegraph Company in every instance figures that its plant is worth what it costs to put it in the field ready for service. In other words, the company has never made any mistakes, has never wasted any money, and has always been governed by the wisest possible management.

We feel, therefore, in considering this question of confiscation, the Court is brought face to face with this condition of affairs:

1st. There was a duty incumbent upon the telephone company to show that the rates in question were such as required it to render the service for less than it was reasonably worth to the public. This duty has not been discharged, because no proof tending to show what the services were worth has been introduced by the company.

2nd. It was the duty of the company to show as persuasive merely upon the question of the fair value of the rates to the public, what was the actual value of its plant, what was the

**actual income derived from the plant, and what were the real expenses which it took to operate in Memphis.**

Instead of doing this, its capital account alone is disclosed, and we are shown, not the value of the Memphis exchange, but merely its cost. Instead of being shown the income from all of the business originating in Memphis, we have been given merely such income as the company upon an arbitrary basis has seen fit to assign to Memphis. We have had, moreover, the Memphis exchange treated as an isolated and separate thing, instead of as a part of a system upon which the company could afford to lose money in order to gain it on the rest of its system. We have had the expense account so arranged as to appear most strenuously against the Memphis exchange. We have, in short, all of the figures apparently so grouped as not to give the Court that information which was necessary in order to throw complete light upon the question.

We earnestly insist, therefore, that the company has entirely failed in the obligation placed upon it. It has not shown the fair value of the service to the public, but has introduced no evidence whatever in that regard. Second, it has not shown what was a fair return to the company, because it has, first of all, introduced no evidence whatever as to the present value of the plant. The evidence which it did introduce was wholly as to the original cost of its Memphis property. Even in this proof it has not complied with the rule which this Court says should be obeyed. It has made no allowance for any mistakes of its predecessors; it has not shown the cost to have been what was reasonable and fair, or whether or not the plant was built extravagantly.

Moreover, it has failed to show by proper account that the company would not earn a fair return upon the real value of its property under the new rate. The expense account has been padded, the earnings reduced, and the whole matter is in such a shape that this Court cannot clearly see what the conditions at Memphis are. Under these circumstances, your Honors have repeatedly held that the complainant is not entitled to the relief sought.

“Where the case rests as it does here, not upon observation of the actual operation of the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves



us in grave doubt. The valuation of the property was an estimate, and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation. The inferences were based upon the operations of the preceding year, and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. \* \* \* If hereafter it shall appear under the actual operation of the ordinance that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But as the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation."

Knoxville v. Knoxville Water Co., 212 U. S. 1.

It is earnestly submitted that the trial judge erred in holding that the rates were confiscatory and in violation of the Fourteenth Amendment to the Constitution of the United States, and that this Court, if in doubt upon the matter, should follow the rule laid down in other cases of uncertainty, and allow the matter to be decided by the test experiment.

## II.

His Honor, the trial judge, based his action solely and exclusively upon the theory that the telephone company was being deprived of its property in violation of the Fourteenth Amendment to the Constitution of the United States by the rates prescribed in the ordinance. He has expressly pretermitted and refused to pass upon the other questions that are in the bill, viz., that the City of Memphis had no power whatever to regulate the rates, and that if it had such authority, it had deprived itself of it by a contract entered into between it and the telephone company.

While we feel that the only question properly before this Court is whether or not the rates in question were confiscatory, upon review, the entire record in the case may be considered, and, therefore, we shall now discuss the other two phases of the bill in order, considering first whether the City of Memphis had authority conferred upon it by the legislature to fix the rates in question, and, secondly, whether thus having had such authority, the city deprived itself of the power to



regulate rates by entering into a contract with the telephone company.

It is perfectly clear that the legislature has the right to confer upon a municipality the power to regulate telephone rates.

Cooley's Constitutional Limitations, Sec. 204.

Dillon on Corporations, Sec. 36.

Wright v. Nagel, 101 U. S. 791.

New Orleans Waterworks v. New Orleans, 164 U. S. 481.

City Railroad Co. v. Citizens Street Railway Co., 166 U. S. 557.

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685.

Walla Walla Water Co. v. Walla Walla, 172 U. S., p. 9.

Attorney General v. Old Colony R. R., 160 Mass. 67.

Georgia R. R. v. Smith, 70 Ga. 694, 128 U. S. 174.

Chicago, etc., R. R. Co. v. Jones, 149 Ill. 380.

R. R. Commissioners v Grocer Co., 53 Kansas 212.

Clyde v. Richmond, etc., R. R. Co., 57 Fed. 439.

We feel that this rule is so well sustained, not only by the above authorities, but by numerous decisions from other jurisdictions, that it does not require any discussion before this Honorable Court. The question is, has the legislature exercised its right to confer jurisdiction to regulate rates upon municipalities, and granted to the City of Memphis the power to regulate telephone rates.

The presumption as to reasonableness of rates extends also to the authority of the rate making body. It is always assumed by the Court that the body both has authority and has exercised it properly. Certain, therefore, if federal jurisdiction rested solely upon the Fourteenth Amendment this presumption would prevail. Whether the fact of diverse citizenship alters the rule which would otherwise prevail, we are not certain. So, relying upon the fact that there is really a presumption in the city's favor we shall now consider the conditions as if such presumption did not exist.

Opposing counsel contended below, and will, of course, insist here, that a corporation must, in order to exercise a power, show clearly that it has been conferred upon it in its charter by the legislature. We do not deny the general application of this rule where the presumption of reasonableness does not apply, but insist that the authorities holding that a municipality must show that a right has been conferred upon it before it can exercise such right, are not to be construed

with the rigor and harshness usually contended for. The proper doctrine to govern the construction of the powers of a municipality is thus set forth in 28 Cyc. 263, after a complete review of the authorities:

“It has often been judicially declared that a corporation claiming a right or power as against the public, must be prepared to prove its title, and that the courts incline against any presumption of power being granted which is not their common right; in other words, for treatment with the rule of strict construction; but it seems also to be well established by repeated adjudications that municipal corporations may exercise all powers within the fair intent and purpose of their creation which are reasonably proper to give the effect to the powers expressly granted, and that in so doing, they can have the choice of the means adapted to the ends and are not confined to any one mode of operation. The latter view seems more consistent with reason, since the grant of power to a municipality is a grant, not to a private company for personal use, but to a public institution for the public welfare.”

This declaration we believe a fair and reasonable one to both parties in this case. If the charter of the City of Memphis be considered in the light of this rule, and by the other well known canons of construction, it will, we think, be evident that the City of Memphis has been granted the right and power to regulate the charges of telephone companies.

The charter of the City of Memphis is contained in Chapter 11 of the Acts of 1879, and the various other subsequent acts amending the original statute. At the outset it was the purpose of the legislature to give to the City of Memphis as much power as it was possible to confer upon a municipality. Such power was given to regulate its own streets, that the Courts have held in the case of the City of Memphis v. Postal Telegraph Company, 145 Fed. 502, that the right existed to collect a pole rental from all wire using companies. In the same Act of 1879, the legislature also granted the fullest police power to the City of Memphis by Section 3 of said Act, as follows:

“And to have and exercise entire control over all streets and other public property of the taxing district as well as that within and that without the taxing district, and they shall have the power over all of the affairs in the taxing district in which the peace, safety or general welfare of the inhabitants is interested.”

And by Section 4 of the same Act, it was provided:

“Be it further enacted, That the Legislative Council as established in Section 2 of this Act, shall be vested with the power and charged with the duty of making all laws and regulations not inconsistent with the general laws for every object, matter and subject within the local government constituted by this Act.”

It was insisted in the court below that these were merely the general provisions of ordinary city charters, and did not authorize the city to regulate rates, or charges, of any public service corporation. It will be noted, however, that these clauses go to the fullest extent in conferring both police power and the right of making suitable regulations in order to enforce that power. The right of the regulation of rates is one of the police powers of the state, and the State of Tennessee has, in the case of the charter of the City of Memphis, endeavored, as far as it was possible, to invest said city with the right to exercise all of the police powers which the state possessed. It seems, therefore, clear by these clauses that the legislature gave the right to the City of Memphis to regulate telephone rates.

But the right of the City of Memphis to regulate the charges of the Cumberland Telephone & Telegraph Company is not based alone upon the sections above quoted. Full and complete powers have been given to the City of Memphis when the legislature amended the city charter by Chapter 54 of the Acts of Tennessee of 1905, where the following clause was placed in the statute:

“Be it further enacted that the Legislative Council shall have the power to pass for the government of the city any ordinance not in conflict with the constitution or laws of the United States or the State of Tennessee.”

This is a very clear and very broad power, and constitutes a sort of climax to the powers that had been granted by the Act of 1879, and by the various intervening statutes down to 1905. It is not a general welfare clause. It is intended to make the City of Memphis a miniature state—to vest it with all the powers of sovereignty as far as the state could permit it to do—and to perform any act and pass any legislation which did not contravene the constitution or the general laws of the state.

In *Barnes v. District of Columbia*, 91 U. S. 940, the Supreme Court of the United States says:

"A municipal corporation in the exercise of all of its duties, including those more strictly local or internal, is but a department of the state. A legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again, it may strip it of every power, leaving it a corporation in name only, and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually given to a municipality. We do not regard its acts as sometimes those of an agency of the state, and others those of a municipality, but that its character at all times remaining the same, it is great or small according as the legislature may extend or contract the sphere of its action."

In *Tippacanoe County v. Lucas*, 93 U. S. 108, the Supreme Court of the United States says:

"Municipal corporations are mere instrumentalities of the state for the convenient administration of the government, and their powers may be qualified, enlarged or withdrawn, at the pleasure of the legislature."

In *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, it is said that courts will assume that municipal corporations exercise their discretionary powers properly, in good faith, and with regularity.

Mr. Abbott in his work on *Municipal Corporations*, Vol. 1, 198, quotes *State v. Swearingen*, 12 Ga. 23, as follows:

"Municipal corporations are the germs and miniature models of free government; and their internal police administration should not be interfered with for slight causes; not unless some great right has been withheld or wrong perpetrated."

In *Phelps v. Watertown*, 61 Barb. (N. Y.) 121, it is said:

"Courts of equity have no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing bodies."

In the case of *Water Co. v. Freeport*, 180 U. S. 679, the Supreme Court says:

"The power of regulation (of water rates) is a power of government continuing in its nature."

In *Knoxville v. Knoxville Water Co.*, 107 Tenn. 686, the Supreme Court of Tennessee said:

"While the rate to be paid for water is not so palpably a regulation within the police supervision of a city, as is the purity and supply of the water furnished, yet the rate of charge is a matter which affects the health, welfare and comfort of the city, since if rates are unreasonably high, they will prove a restriction upon the use of water, which may seriously impair the health and interfere with the comfort and welfare of the people."

In the case of *Leeper v. State*, 103 Tenn. 531, the Supreme Court of Tennessee said:

"The scope and meaning of the term 'police power' has never been defined, \* \* \* but it embraces every law which concerns the welfare of the whole people of the state, or any individual within it, whether in their public or private relations, whether it relates to the rights of persons or the rights of property."

Practically the same thing was said about the term "police power" in *New York v. Miln*, 11 Peters 139, by the Supreme Court of the United States.

We submit that since the city has gradually grown in power until by the Act of 1905, it was made practically a miniature State, possessing within its territorial limits all the powers possessed by the State itself, that it clearly had the power to make a reasonable regulation of telephone rates within its territorial limits. The State Legislature, in endowing the City of Memphis with the full power of the State, did not reserve to itself any particular power possessed by the State, such as the regulation of rates, but it conferred upon the said city the broad and unlimited power above set forth.

That a State itself has the power to regulate the rates of a quasi public corporation is not now open for discussion. More than once the Supreme Court of the United States has announced the doctrine that a State has such power.

In 27 Ency. of Law, 2d. Ed., 1019, the rule is stated as follows:

"Both telegraph and telephone companies are engaged in a business affected with the public interest within the meaning of a rule laid down in a leading case (*Munn v.*

Ill., 94 U. S. 113), and the State, in the exercise of its police power, may, therefore, regulate the charges of such companies and provide a maximum rate which their charges shall not exceed."

Chesapeake Tel. Co. v. Manning, 186 U. S. 238, and a number of other cases.

It has been held that under the general police power delegated by a State to a municipality, that the municipality could take long strides toward the regulation of internal affairs of a quasi public corporation. In *Crooms v. Shad*, 40 So. Rep. 497, the Legislature of Florida has given the city of Pensacola the following power:

"The council shall have the power to pass for the government of the city, ordinances not in conflict with the Constitution of the United States, the Constitution of Florida and the statutes thereof."

Under this authority, the city of Pensacola, on September, 1905, passed an ordinance, the caption of which was as follows:

"An ordinance to be entitled, an ordinance to require street car companies and others operating street cars along the streets of Pensacola, to furnish separate cars, or divisions on cars, or other provisions for the separation of the white and colored passengers."

The identical question was raised by that ordinance that is raised by complainant here, viz., that the city of Pensacola had no authority to pass the ordinance. The Supreme Court held that the authority from the Legislature, quoted above, was sufficient to authorize the passage of the ordinance.

On this proposition also see:

*St. Louis v. Schoenbusch*, 95 Mo. 620, 8 So. West 791.

*Porter v. Vinzant*, 39 So. 607.

*White v. Commonwealth*, 92 So. W. 285.

In *Sayreborough v. Phillips*, 148 Pa. 482, it is held that an ordinance prohibiting a person from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license, and fixing the price of such license at a figure evidently intended to be prohibitive, was valid.

Prior to the Act of 1905, the State had conferred upon the City of Memphis the power "to have and exercise entire control over the streets and other public property of the city," and in *Chas. Simelson Co. v. Maryland Tel. Co.*, 99 Md. 141, the Supreme Court held that an ordinance passed by the city, in which the maximum rates of telephone companies were fixed, was a valid exercise of the power under the authority given the city to exercise control over the streets and alleys in said city.

We earnestly insist that the authorities above cited establish the principle that the power to regulate rates does not have necessarily to be conferred in express terms upon a municipality, but may be embraced in a grant of general powers, provided the grant is broad enough in its scope. If this be the case, the grant made by the State of Tennessee is as broad and general in its character as it is possible for any grant to be, and the City of Memphis has been vested with the power to regulate telephone rates.

So far we have considered the question solely upon those general grants of power given to the City of Memphis, but if a specific power to regulate rates is necessary, such also seems to have been given to the City of Memphis by the State Legislature. By Chapter 366 of the Acts of 1903, the power to regulate the rates of various public utility corporations was conferred upon the city:

"The legislative council of such taxing district is hereby given the power and authority to fix and regulate from time to time, within reasonable limits, the scale of charges for the production or service of all district telegraph companies, gas companies, etc."

It is insisted by the complainant below that a district telegraph company was not intended to embrace a telephone company and this act could not be construed to increase the authority of the City of Memphis. It has, however, been repeatedly held, that the term "telegraph" embraces telephones.

In 25 Am. & Eng. Ency. of Law, 1st Ed. 746, it is said:

"The term telephone, in a general sense, applies to any instrument or apparatus which transmits sound beyond the limit of ordinary audibility. Technically it is restricted to an instrument or device which transmits the voice of the speaker by means of electricity.



A question as to the exact meaning of the word 'telegraph' is whether, when used in a statute, it includes telephone. The definition given above includes a telephone, and, as a rule, a statute concerning telegraphs, in the absence of special controlling conditions, may apply to the telephone as well."

### TELEGRAPH EMBRACES TELEPHONE.

Bell Telp. Co. v. Com. (Pa. 1886), 3 At. Rep. 825.  
Cumberland Tel., etc., Co. v. United Electric R. Co., 42 Fed. 273.  
Roake v. American Tel. Co., 41 N. J. Eq. 35.  
Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.  
Roberts v. Wis. Tel. Co., 77 Wis. 589.

In England, in the case of Attorney General v. Edison Telephone Co., 6 Q. B. Div. 244, it was held that a conversation through a telephone was a "message" or a "communication transmitted by telegraph," and therefore a telegram.

It has even been held that even in a penal statute where, of course, the construction is most strong against any extension of the offense which the statute prohibits, that the word "telegraph" should be construed as embracing a telephone, and that a person guilty of violating a statute on cutting telegraph wires, where he had interfered with telephone wires.

Davis v. Pacific Tel. Co., 127 Cal. 312.

The term telegraph means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word telephone.

Davis v. Pacific Telephone & Telegraph Company, 127 California 312.

Telegraph, as used in Bates' Annotated Statutes, Section 3454, authorizing a magnetic telegraph company to construct telegraph lines from point to point along and upon a public road by the erection of the necessary fixtures, is a mode of transmitting messages or other communications sufficiently comprehensive to embrace the telephone.

Cinn. Inclined Plane Company v. City & Suburban Telegraph Association, 48 Ohio State 390, 12 L. R. A. 534.

Telegraph, as used in Acts 1868, Chapter 471, Section 133, declaring that any person, etc., owning a telegraph line doing business within the State shall receive dispatches from other telegraph lines, etc., should be construed to embrace telephone.

*Chesapeake & P. Telegraph Company v. Baltimore & O. Telegraph Co.*, 7 Atl. 809, 810; 66 Md. 399, 59 Am. Rep. 167.

Telegraph, as used in an act incorporating a telegraph company, may be taken to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, and as sufficiently comprehensive to embrace the telephone; and a company organized as a telegraph company under the general corporation law, is authorized to do a general telephone business.

*State v. Central New Jersey Telephone Company*, 21 Atl. 460, 462, 53 N. J. Law 341, 11 L. R. A. 664.

Rev. St., Sec. 5263 (U. S. Comp. St. 1901, pp. 3579, 3581), authorizing telegraph companies to construct and operate their lines over and along post roads of the United States, includes telephone companies. The telephone and telegraph both communicate messages by means of electricity over wires. The telegraph communicates these messages by sound of instruments; the telephone by the human voice, usually. Both depend upon electricity for their action. Each is but a form of use, and the product and result of the same principle. The names are only used to distinguish the method of the communication.

*City of Richmond v. Southern Bell Telephone & Telegraph Company* (U. S.), 85 Fed. 19, 24, 28 C. C. A. 659.

The term telegraph companies in a statute authorizing a city to license telegraph companies includes telephones. Of course, there is a distinction between the two classes of business, but in almost every respect they are very similar, if not identical. One may require more lines than the other, but we are not aware of any other distinction, outside of their offices or places of operation, distinguishable to the naked eye.

*Wisconsin Telephone Company v. City of Oshkosh*, 21 N. W. 828, 830, 62 Wis. 32.

Telegraphy is the transaction of business over or through telegraph wires. The title of Act, May 1, 1876, entitled, "An

act supplementary to an act to provide for the incorporation and regulation of certain corporations relative to the incorporation and powers of telegraph companies for the use of individuals, etc," sufficiently expresses the purpose to authorize the incorporation of telephone companies, *since the telephone company is virtually a telegraph company.*

The New York Telephone Co. v. Keesey, 5 Pa. Dist. R. 366.

See further, to same effect:

N. W. Telephone Exchange Company v. Chicago, Milwaukee & St. Pal Rd. Co., 79 N. W. 315.

San Antonio & A. P. Ry. Co. v. S. W. Telegraph & Telephone Co., 49 L. R. A. 459, 55 S. W. 117.

Commonwealth v. Penn. Telephone Co. (Pa.), 42 Leg. Int. 180.

Franklin v. N. W. Telephone Co., 69 Iowa 97.

In Iowa Union Telephone Company v. Board of Equalization, 67 Iowa 250, it was held that a telephone company was to be regarded for the purposes of taxation as coming within the denomination of telegraph companies within the meaning of the statute.

It was held in Wisconsin Telephone Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828, that a statute authorizing the formation of corporations for building, owning and operating telegraph lines was sufficient to authorize the formation of corporations for building, owning and operating telephone lines, the decision being based upon the identity of the principle by which communication in each case is secured.

That telegraph in statute includes telephone seems to be absolutely established by the weight of authority in every State in the Union, with the possible exception of Mississippi. A very good discussion of this is found in Joyce on Electric Law, Sec. 8 to Sec. 11.

The phrase "telegraph and telephone" is an expression found in every index digest. It is one used constantly by courts and legislatures in discussing matters touching either the telegraph or the telephone. It is one encountered indifferently in statutes having to do with the telephone or the telegraph. It is to be found in the charters of more than half the telephone companies in the United States, and the term telegraph being the older and therefore the most comprehen-

sive, is very frequently used alone to cover the entire subject of telegraphs and telephones, this being particularly true in the captions of statutes.

“It is not necessary that the title of an act should be an index of its contents. It is sufficient if it fairly gives notice of its contents.”

6 American Electric Cases 107.

The citation being a comment of the court to the effect that a telephone company is a telegraph company, same being the question under discussion. See also Joyce on Electric Law, Vol. 1, page 14.

Indeed, when the Cumberland Telephone & Telegraph Company itself was in court, it was held that the assumption which the company had acted upon in bringing the suit, to-wit, that a telephone company was the same as a telegraph company, was well taken. See the case of the Cumberland Telephone & Telegraph Co. v. United Electric R. R. Co., 12 L. R. A. 544, where the Court says:

“We see no reason to doubt the position taken by the complainant, that the telephone company is a telegraph company, and that under its rights to construct and operate telegraph wires it was empowered to operate a telephone service.”

It is further evident from the charter of the Cumberland Telephone & Telegraph Company itself, as the same appears in the record, in the bill of complainant, that the company is not only a telephone company, but a telegraph company. The word “telegraph” occurs perpetually in its charter. Among the powers of the company are the rights to operate both telephone and telegraph lines, and in the operation of its business it carries on not only regular telephone exchanges, but also sends and delivers telegrams as any other telegraph company. It seems, therefore, that the power to regulate telegraph companies, when it was conferred upon the municipality, authorized it also to regulate the rates to be charged by telephone companies.

We are aware that opposing counsel will claim that in Tennessee legislation affecting a telegraph company can not apply to the Cumberland Company because of the decision in the case of Home Telegraph Company v. City of Nashville, 118 Tenn., page 1.

An examination of that case, however, will show that it is in no way antagonistic to the position here claimed. The courts held that a telegraph company, chartered to do a telegraph business, could not put up all of the structures necessary to do a telephone business on the city streets, because of the additional and added burden of a telephone system over a mere telegraph line. This is certainly good law. A company claiming a grant against a municipality must have the construction used which is most strongly against it, and, of course, could not claim rights by bare and far-fetched implication.

Here we have a case where the charter of a company authorizes it to do both a telephone and telegraph business and where it is doing both kinds of work. The question is as to the police power of the city by virtue of a grant from the State; we are to decide whether or not the right exists in the Memphis legislative council to protect its citizens from extortion. The construction must be in favor of the right to protect the people.

That we are right in this rule of construction is evident from the many decisions of this Honorable Court. We do not feel it necessary to refer to more than one of them, as the cases upon the subject are there set out at length and elaborately reviewed, the conclusion being reached in favor of the city's rights in a case which upon its face seemed to work a hardship to the railroad companies there involved. We refer to *Blair v. Chicago*, 201 U. S., p. 400.

Nor can the use of the word "district" be held in any way to limit or alter the power of the municipality.

Of course, no telegraph or telephone company could be regulated as far as its charges for interstate business were concerned, on account of the power conferred upon the Federal Congress to oversee and to control commerce between the States. But as far as any telephone or telegraph company operates within the taxing district, as far as it is a local concern, the power to regulate it is clearly conferred by the statute upon the legislative council of the City of Memphis.

We earnestly insist, therefore, that the power to regulate telephone and telegraph companies has been conferred by the State Legislature upon the City of Memphis, and that it was in the lawful exercise of a properly vested right when it passed the ordinance attacked in this case.

If, therefore, his Honor, the trial judge, was incorrect in holding that the rates charged were such as amounted to confiscation, the bill cannot be maintained upon the theory that

the City of Memphis had no right in that event to regulate telephone charges.

### III.

This brings us to the last contention of the company, to-wit, that the City of Memphis had, by a contract, deprived itself of the power to regulate telephone charges within the city limits.

In the first place, if the City of Memphis was ever possessed of such power of regulation, it was part of the police power of the municipality, and it is a well-established rule of law that no legislative body, municipal or State, is to be presumed to have parted with its municipal power of regulation, unless the same is clearly and unequivocally expressed.

Thus it was held in *Stone v. State of Mississippi*, 101 U. S. 814, that the State could not in any manner deprive itself of its police powers, and by any contract prevent itself from regulating a lottery conducted within that State.

So also in *Rogers Park Water Co. v. Fergus*, 128 U. S. 28, it says:

“A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.”

In this case it was held that a contract which it was claimed fixed water rates, must be construed so as to allow the municipality, if possible, the continuing right to regulate the water rates in the future.

In the *Railroad Commission* cases, 116 U. S. 316, the Court says:

“This power of regulation is a power continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something in law that is equivalent.

If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Bank v. Billings*, 4 Peters 514, its abandonment ought not to be presumed in a case where the purpose of the State to abandon it does not appear. This rule is elementary, and the cases in our reports where it has been considered and applied are numerous.”



In *Freeport Water Co. v. Freeport*, 180 U. S. 587, it was alleged that the city had fixed a certain water rate which was to endure for thirty years. It was held, however, that the power to make such a contract must be expressly shown in all cases, and the right to make a new regulation was sustained, despite the previous contract.

So, also, in *Louisville & Nashville R. R. v. Kentucky*, 183 U. S. 517, the right to regulate rates was claimed and upheld, despite a charter provision of the railroad company which, it was claimed, constituted a contract preventing rate regulation.

See also:

*Decatur Gas Company v. Decatur*, 120 Ill. 67.  
*Manhattan Trust Co. v. Dayton*, 59 Fed. 327.

*Abbott on Municipal Corporations*, Vol. 3, Sec. 127, thus lays down the rule:

“Governmental powers are such as pertain to the sovereign to be exercised for the benefit of the public at large. It follows from an application of this principle that the right to regulate, whether based upon the police powers or that one which has for its purpose the protection and maintenance of public property to the uses for which acquired, cannot be surrendered or disposed of by contract, license or grant to natural or corporate persons engaged in supplying the facilities, or any of them, under discussion.”

In *Danville v. Danville Water Co.*, 178 Ill., the Court says:

“No contract is reasonable by which the governing authority abrogates any of its legislative powers and precludes itself from meeting in a proper way the emergency and occasions that may arise. These powers are conferred in order to be exercised again and again, as may be found needful, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that a free government, with the restrictions for the protection of individual or municipal rights, could long exist without its recognition.”



See also:

Winchester & Lexington Turnpike Co. v. J. H. Craxton (Ky.), 33 L. R. A. 177.

Lowell Fork & S. H. R. R. v. West Va., 25 West Va. 324.

West Virginia Transportation Co. v. Switzer, 25 West Va. 434.

In the last case the Court said:

“The exemption of railroad rates from state regulation by virtue of a charter provision must appear by such clear and unmistakable language that it cannot be reasonably construed inconsistent with the reservation of the power by the state.”

See, also, Georgia R. R. & Banking Co. v. Smith, 128 U. S. 174.

The power to change such rates as seem desirable or reasonable given to a railroad by its charter is not a contract preventing the state from regulating the charges.

Peck v. Chicago & N. W. R. R. Co., 94 U. S. 164.

C. M. & St. P. R. R. Co. v. Ackley, 94 U. S. 179.

Stone v. Wisconsin, 94 U. S. 181.

Ruggles v. Illinois, 108 U. S. 526.

See, also, the very full discussion of the right of a city to bargain away its police powers and the presumptions which exist in such cases in—

Blair v. Chicago, 201 U. S. 400.

Here the entire subject is carefully considered and the conclusion reached that the grant by the city must be in clear and explicit terms in order to prevent it from claiming the power to regulate street railways in the city.

It is in the light of these authorities that the question of a contract must be considered. There must exist some clear and unequivocal exemption given to the company in order to release it from the power of the city to regulate the charges. This contract is claimed to arise from two sources.

It was shown in the evidence that the owner of the telephone exchange at Memphis, S. T. Carnes, had a permit from the city to use the streets. We have already set out in the statement of facts above that the validity of this permit has been

tested in litigation before the Supreme Court of the State of Tennessee. The opinion of the lower court was affirmed and the effect of this was to hold that the city could not at will oust the telephone company from the streets. A careful perusal of the opinion shows that this was what was decided and nothing more. The right of the city to regulate rates, the question of its general police power, were not either passed upon or considered.

It is true that if the question had been decided in favor of the city that this present suit would be at an end. If the company were a trespasser on the city streets or was removable at the will and pleasure of the city authorities, then the city could have annexed any conditions it saw fit to the grant which it gave. Where a party has a right to refuse consent it can annex to its consent any conditions which it sees fit, whether these conditions are reasonable or not. This is elemental contract law.

The only result of the pole rental case in the Tennessee Supreme Court is that the city cannot at pleasure oust the telephone company or impose upon it any conditions which it pleases. The city is still left with all of its police power and for the protection of its citizens can pass any rules or regulations and make any rates which are reasonable.

We have not contended for any other power than the one to impose reasonable rates, and the authority to do this exists, whether the city has the right to oust the company from its streets or not.

We shall not enter into a discussion, therefore, of the differences between the right of a city to refuse its consent and impose terms as conditions precedent to permitting entry, and the police power of the city after its consent has been granted, contenting ourselves with citing certain of the leading cases wherein this variance is shown.

- 3 Elliott on Railroads, Ch. 42, Sec. 1076, et seq.
- Northern, etc., R. R. v. Baltimore, 21 Md. 93.
- Ruttles v. City of Covington, 10 S. W. 644.
- Detroit v. Detroit City R. R. Co., 37 Mich. 558.
- Moundsville v. Ohio River R. R. 37 West Va. 92.
- Fath v. Tower Grove & Lafayette R. R. Co., 105 Mo. 532.
- N. Y. & N. H. R. R. Co. v. New York, 4 Blackford, 193.
- Plymouth Township Co. v. Chestnut Hill & N. R. Co., 168 Pa. 181.
- Blair v. Chicago, 201 U. S. 400.

See, also, the elaborate discussion of this difference in—

Illinois Trust & Savings Bank v. Arkansas City, 96 Fed. 271.

Morristown v. East Tennessee Tel. Co., 115 Fed. 307.

Chicago v. Sheldon, 76 U. S. 50.

From these authorities we feel certain that the only effect of any contract claimed to have been made with Gen. Carnes would be to allow the company to remain in the city—to give it right to use the streets. The police power to regulate, to impose reasonable conditions and rates, remained unaltered. If the telephone company, therefore, is protected against any attempt upon the part of the city to regulate rates, it must draw this exemption from some other source.

Nor need we seriously consider a claim that the Acts of 1885, p. 120, and following, gives to the telephone company a right to operate in a city free from the power to regulate charges. This Act of 1885 provides only for telephone and telegraph companies desiring to run their lines along roads or highways, or to go through city streets.

But this act does not in any part thereof allow telephone companies to string their wires, or plant their poles at all through city streets, nor does it declare that even if such power does, by implication, exist, that a telephone company operating in a city is to be freed from the power of the city to regulate the telephone charges as well as to make proper and needful rules and regulations.

The second contention of the telephone company is that by the contract entered into between it and the city in 1903, that the City of Memphis deprived itself of the power to regulate telephone rates after the number of connections in the Memphis exchange should exceed 7,000.

This contract, however, fails to bear out the construction intended. The cause of this contract was a suit brought by the City of Memphis against the Cumberland Telephone & Telegraph Company for pole rentals for the years 1902 and 1903. The City of Memphis insisted that it had a right to collect these rentals from the telephone company, and other wire using companies in the City of Memphis. The telephone company denied this right, and in order to settle the question of the right to collect these rentals which were involved in the suit, a compromise agreement was entered into which is found on page 58 of the record. It will be noted that by this com-

promise agreement the city waived its right to the collection of any rentals for the years 1902 and 1903. It is expressly agreed, however, that the City of Memphis retains all of its rights to collect rentals for any subsequent years, and the telephone company retains its right to make all of its defenses against any such claims for rentals in any suits which might be brought. It is further provided that the Cumberland Telephone & Telegraph Company shall furnish certain free service to the City of Memphis, which free service, it seems, was already, to a large extent, being previously rendered (Record, p. —). It is also provided that the City of Memphis shall have the right to use one of the underground conduits of the telephone company, and also to string its wires upon the telephone company's poles. None of these provisions, of course, can be construed as depriving the city of any power to regulate rates.

But it is claimed that the following clause does destroy the city's power for the future:

“The said telephone and telegraph company in the exercise of any rights which it may have, shall charge for its service as a telephone company an amount which shall not exceed an average per station of \$1.00 per week until the number of stations connected with the exchange of said company shall exceed 7,000, when the limitations upon the charges fixed in this contract shall cease.”

Now, the foregoing is the only writing which opposing counsel contends constitutes a contract as to rates. This provision was put in the compromise agreement by the telephone company as a concession or consideration to the City of Memphis for dismissing its suit for pole rentals. The thing that the City of Memphis agreed to do was to dismiss its suit for pole rentals. The thing that the Cumberland Telephone & Telegraph Company agreed to do, among others, was not to charge more than an average of \$1.00 per week for each station for telephones until the number of subscribers reached over 7,000.

In the first place, according to the complainant's own testimony in this record, the number of telephones operated by the complainant company is now in excess of 7,000, and, therefore, the alleged contract is inoperative under its own express limitation.

In the second place the promise in the contract is that said company would not charge certain rates, and the City of Mem-

this, in the alleged contract, made no agreement whatever that it would not exercise its power to regulate telephone rates whenever the proper occasion arose. This identical distinction is clearly stated by the Supreme Court of the United States through Mr. Justice Holmes in *Knoxville Water Co. v. Knoxville*, 189 U. S. 436. In that case the Supreme Court said:

"The contract contained three distinct parts; first, the promise of the company; next, those of the city, and last, the mutual undertakings. In the first part, the company undertook as follows: 'Said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons,' subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

After the contract was made, the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated with one of the other concerns, which was a corporation. The towns, on their side, were made a part of Knoxville; and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case, and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cut down the rates which the company had been charging and asserts its right to charge.

The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended, it was far too important to be left to implication. In form, the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city, or in that which contains the still later mutual agreements."

In *Knoxville v. Knoxville Water Co.*, 107 Tenn. 678, it is said:

"That an ordinance binding a water company to furnish an adequate supply of water does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee 'shall charge the following annual rates to consumers during the existence of this franchise,' as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. *Rogers Park v. Fergus*, 107 Ill. 571; *Danville v. Danville Water Co.*, 69 Am. St. Rep. 304; *Freeport Water Co. v. Freeport*, 180 U. S. 679."

In *Decatur Gas Co. v. Decatur*, 120 Ill. 67, it is said:

"A city is not authorized to bind itself by contract to furnish water for a period of years at a fixed rate."

In the case of *Manhattan Trust Co. v. Dayton*, 59 Fed. 327, it is said:

"A provision for a maximum price is not a contract for any period, but an exercise of municipal power to regulate, and a limitation on the license granted."

In the case of *Danville v. Danville Water Co.*, 178 Ill., the Court says:

"No contract is reasonable by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in a proper way emergencies or occasions that may arise. These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government with the restrictions for the protection of individual or municipal rights could long exist without its recognition."

Even, therefore, while the contract was in existence, the City of Memphis had the right to regulate the rate in any manner that was reasonable if the construction of the contract

be adopted which seems best sanctioned by authorities. If we assume, however, that opposing counsel is correct, and the contract means not what it says, viz., that the Cumberland Company shall not charge more than a certain rate, but that the city shall not have the power to require it to charge less, then what condition of affairs exists?

By the terms of the contract all limitations in regard to the charging of rates were to cease when a certain number of telephones were connected with the local exchange. Until this time the Cumberland was under a limitation as to the maximum rates it could charge, and—according to opposing counsel—the city was under a limitation as to the minimum rates which it could require. But when the total exceeded 7,000 connections, then all restrictions upon both parties ceased. There was no longer a contract between them.

Clearly, then, the condition of both the city and the company after the number of telephones reached 7,000 was that they were no longer bound by any contract; the company was free to charge such rates as it saw fit, and the city to regulate the rates in any manner it saw fit, subject only to the limitations of the general law upon the subject. These limitations require that the rates charged by the company, or imposed by the city, shall be reasonable. In other words, when the conditions called for by the contract are fulfilled, and it is abrogated, the parties are left in precisely the same condition they were in before the contract was made, and as if none ever had been made.

This is certainly the logical construction of this contract, and we see no reason why this particular instrument should not be submitted to the same rules of interpretation as would govern any other agreement. We cannot see anywhere in the record any agreement which estops the City of Memphis from using its police power to regulate rates. There is no such clear, definite and certain grant to the telephone company as the law requires. There is, indeed, no manner of exemption at all, now that the telephone connections are claimed to exceed 7,000.

The question of this compromise agreement of the pole rental suit which the complainant claims constituted a contract does raise, however, another very interesting question. It was the duty of the company to show in this suit, first, that it had the number of connections requisite to enable the contract to be set aside, or that the rates imposed by the city were contrary to those prescribed by the contract.

The company throughout had acted upon the supposition that it had enough telephones to cause the contract to cease by



limitation, and has admitted that the rates charged by it were greater than those allowable under the contract. There must, therefore, be in the record some clear and convincing proof to the effect that there are more than 7,000 telephones in use at Memphis. As a matter of fact, no such proof exists.

It is true the auditor of the company testifies that there are 7,800 telephones in operation, but it will be seen from the exhibit to his deposition that in making up the number of telephones he counts in every receiver or transmitter which is connected with a telephone, no matter whether they are merely desk extensions or parts of a private exchange or not. Unless all of these extensions, desk telephones and other devices, not properly entitled to be called individual stations, are included in the total number of telephones, there were less than 7,000 telephones in operation in the City of Memphis at the time the suit was filed.

As we have suggested before (I) these telephones must be considered as either individual stations, or merely as connections not entitled to the dignity of individual stations at all. When it was suggested to Mr. Smith that all of these connections should be considered as individual stations and that the company would be able to raise the rates on all of them and thereby prevent a diminution in revenues, he contended most strenuously and strongly that they were not, strictly speaking, telephone connections at all, and that the rates upon them could not probably be raised. We earnestly insist, therefore, that if this construction be adopted, it is clear from the exhibits to his own deposition that there would be less than 7,000 telephones in the City of Memphis, and that the contract made in compromise of the pole rentals suit of 1903 would prevent the Telephone Company from charging more than an average of \$1.00 per week per station for all the telephones used in Memphis.

The complainant, in other words, if we take Mr. Smith's statement that the extensions are not telephones at all, is under a contract with the City of Memphis to furnish telephone service at rates which shall not exceed \$1.00 a week per station. It is the company's contention that this also fixes the maximum rate. If this be true, the parties have a contract regulating the charges of the company, and the complainant is under the obligation of showing that the city has breached its contract by the rates which the ordinance would require the company to put in operation.

No attempt has been made to do this; the testimony being confined to proof of what the company is earning upon its

plant. Certainly, until it is established that the contract has expired, the complainant cannot ask for any other terms than those which the contract imposes.

We earnestly insist, therefore, first, that there was no contract upon the part of the City of Memphis by which it bound itself to allow the company in any event to charge \$1.00 per week per station for every telephone in Memphis, regardless of whether or not this rate was reasonable.

Secondly, that if the agreement did so bind the City of Memphis, it terminated by its own language when the number of stations exceeded 7,000.

Third, after the number of stations exceeded 7,000, the city was left free in any event to compel the company to charge what was a reasonable rate for its services.

There thus rested upon the complainant the duty of showing either:

- (1) That the number of connections exceeded 7,000, or
- (2) That the City of Memphis was charging a rate not authorized by the contract.

If the number of connections exceeded 7,000, it was the duty of the complainant to establish that the rates prescribed by the City of Memphis were unreasonable. That this has not been done we have shown in No. 1, supra.

Therefore, the complainant has failed to show that the rates prescribed by the ordinance were unreasonable, has not established a lack of power upon the part of the City of Memphis to make the rates, or any contract by which the city bound itself to allow the company to charge certain rates indefinitely, nor has it shown clearly that it is not bound by a contract to charge less than its present rates.

For these reasons we insist that the trial judge was in error and should have dismissed the complainant's bill.

All of which is respectfully submitted.

Marion G. Evans

C. M. Bryan.

# In the Supreme Court of the United States.

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CITY OF MEMPHIS

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COM-  
PANY.

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## STIPULATION OF COUNSEL.

It is agreed by the parties to this suit that the attached and following deposition of S. T. Carnes is a part of the record in this case, and that the printed copies thereof may be used by either side, in the same manner as if originally incorporated in the transcript.

*Charles M. Bryan*.....  
Counsel for the City of Memphis.

*E. E. Wright*.....  
Counsel for the Cumberland Tel. & Tel.  
Company.

CITY OF MEMPHIS

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COM-  
PANY.

The deposition of Samuel T. Carnes, taken by consent of counsel, without notice, and the right to except to the same, or any part thereof, for incompetency or irrelevancy, being alone reserved. It is also agreed by counsel that the deposition taken in this case may be read as evidence in the case of the Cumberland Telephone and Telegraph Company v. City of Memphis et al., in the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

The said witness, being first duly sworn, deposeth and said as follows:

## DIRECT EXAMINATION FOR DEFENDANT.

**By Gen. Luke E. Wright:**

“Q. 1. What is your name, age, residence and occupation?

A. Samuel T. Carnes; fifty-seven years of age; Memphis. I am not at this time engaged in any active business.

Q. 2. How long have you lived in the city of Memphis?

A. For a lifetime; during my lifetime.

Q. 3. Were you at any time engaged in the telephone business in the city of Memphis?

A. I was.

Q. 4. State what connection you had with the telephone business in the city, and under what circumstances.

A. During the year—I will have to refresh my memory—I think it was '78 or '79.

Q. 5. December, 1879, was the date of that application?

A. Well, during the year 1879, if that was it, I procured the right, under the Bell Telephone Company, to establish an exchange in Memphis, and did subsequently establish an exchange in Memphis, which I operated until 1883.

Q. 6. In the operation of this exchange, state whether or not you erected poles and wires for your telephone exchange in the streets and alleys of said city?

A. I did.

Q. 7. State whether or not you had any permission from the city authorities to do so, and, if so, in that connection state just what you did in order to procure authority to construct poles and wires in the streets and alleys of Memphis?

A. I petitioned the city, in writing, for a franchise, or permission, to erect poles and lines upon the streets, in order to facilitate the business of this telephone exchange. This petition was then first referred to a committee of three and at a subsequent meeting was granted, on condition that, with the understanding that I would give to the city such telephones as they needed at half

price, and that I was to allow them to utilize space on all the poles erected, for the purpose of running the wires of the fire alarm system.

Q. 8. You say you filed a petition, in writing?

A. Yes, sir.

Q. 9. To whom was that petition addressed?

A. It was addressed to Legislative Council of the Taxing District.

Q. 10. Of Shelby County?

A. Of Shelby County.

Q. 11. The Taxing District of Shelby County is now called the City of Memphis, is it not?

A. Yes, sir.

Q. 12. Have you given the substance of that petition?

A. I have.

Q. 13. An examination of the minutes of the Legislative Council of the Taxing District of Shelby County, in book 'A,' page 95, of date December 15th, 1879, shows as follows: 'A communication was read from S. T. Carnes, on organizing a telephone exchange, and asking the district to connect their lines and to allow one to the fire department. On motion, it was referred to a committee of three, Messrs. Overton, Goyer and Gunn.' Is this extract from the minutes that I have just read to you, with reference to the petition to which you have already referred?

A. It is evidently a reference to the petition, but it was read as a petition to the council—as a request.

Q. 14. Well, it does not purport to give the substance of it, but it refers to it?

A. That is a reference to it.

Q. 15. I find also on the minutes of the Legislative Council of the Taxing District of Shelby County, in book 'A,' on page 96, of date December 18th, 1879, the following: 'The committee on petition of S. T. Carnes recommended that it be granted, provided no post be put up except by permit of the president and engineer, and that the granting of same does not create a monopoly. On motion, the report was received and adopted.' Does that

have reference to the report of the committee which was appointed to act upon your petition, which you have referred to above?

A. Yes, sir.

Q. 16. General Carnes, was there any limit upon the time that you were to have the right to plant your poles and string your wires in the streets and alleys of the city of Memphis?

A. None at all.

Q. 17. Or any other condition than those you have mentioned?

A. Nothing more in the granting of my petition. No limit was expressed.

Q. 18. I mean whether anything in your petition asked for a limited time?

A. No, sir.

Q. 19. Or was there anything in the grant that limited you to a fixed time?

A. Not at all. It had not been usual, up to that time, to limit any franchise like that, and there was no limit upon the petition. In fact, while the petition was granted, the only thing that seemed to impress the members of the council was the probability that it was more of a plaything or a toy than a reality, than a substantial business—because I remember the little whispering—the jest—the expression of jest among the members of the council, and finally was asked the question, if I thought that was the real and substantial business, and, while I expressed myself rather positively that I thought it was, and that I thought it would grow to be quite a business, some one said, ‘I hope it will,’ and some one commiserated with me for my advanced ideas; at any rate, spoke as though I were fooling with something that did not look substantial to them. So they granted it, as I had petitioned it. That was simply asking a right of way for the use of the sidewalks, etc., to erect poles and string wires for the establishing of a telephone exchange.

Q. 20. And, as the condition for granting it, they stipulated that you were to give the city half rates for such telephones as they wanted?

A. As they needed, and the use of our poles—the room on our poles for the fire alarm wires. At that time the

system had not progressed to just what it is now, and really, in no place did they want over two wires, and some places only one.

Q. 21. You mean for the fire alarm?

A. For the fire alarm, yes, sir.

Q. 22. How did you happen to become interested in the telephone business, General Carnes?

A. Well, in my absence from here, refugeeing, during the yellow fever times, I saw—got interested in this telephone proposition in St. Louis.

Q. 23. That was in 1879?

A. Yes—no—I think prior to that time, when I went East; that was it. I first got interested in this proposition, and I made application then to the Bell Telephone Company for a franchise for Memphis.

Q. 24. To use their patent?

A. Yes, sir, to use their patent; and they submitted to me their proposition. They required, of course, some evidence of activity on my part, and ability to start an exchange, etc. They gave me their form of contract, showing the royalties they would charge, and I simply closed the matter up with them, and held it over—in the meantime the yellow fever came on, and I had nothing. I had procured this before the yellow fever broke out here.

Q. 25. At the time you began the establishment of a telephone exchange in the Taxing District, or, as I shall hereafter call it, Memphis, was there any other telephone company in operation or any other telephones in operation?

A. There was no exchange here, but there were one or two individual lines; for instance, Mr. H. A. Montgomery, as president of the compress company, had a telephone at one or two compresses, and another at his house, and Dr. Heber Jones had a telephone from his house to his office, and Drs. Mitchell and Maury had one from each of their residences to their offices.

Q. 26. Were they connected with any switchboard so that they could talk to each other, or were they simply for their private and personal convenience?

A. For their private and personal convenience.



Q. 27. They couldn't talk from one to another?

A. No, sir; they couldn't talk from one to another.

It was merely to call from one point to the other.

Q. 28. From the house to the office, or visa versa?

A. Yes, sir.

Q. 29. After you got this permission, or franchise, as you term it, from the city of Memphis, to use the streets and alleys for the purposes of your exchange, what, if anything, did you do towards establishing the exchange?

A. Why, I fitted up an office, and had a switchboard, and began putting up telephones, as fast as I could get orders for them. I was a little slow at first, because it was something new, and it was rather difficult to get subscribers at the start. I think Mr. Montgomery, having tried this telephone, did more to encourage at the start than anybody else, because almost from the beginning he connected his compresses, brought these lines from the various compresses into the exchange, and from his residence; and then I connected the two doctors' lines. In other words, I bought the lines for some consideration, and brought them into the exchange.

Q. 30. You began, then, constructing the exchange, putting up the poles and stringing the wires along the streets?

A. Yes; I began with about twenty-five—probably about twenty-five—subscribers.

Q. 31. I find this upon the minutes of the Legislative Council of the Taxing District, in book 'A,' page 115, of date February 13th, 1880: 'A communication from S. T. Carnes, manager of the telephone company, asking that the engineer be instructed to show him the places to plant his poles, was referred to the engineer to do so.' Please state whether or not the poles which you placed in the streets were placed under the supervision of the city engineer?

A. They were.

Q. 32. That minute correctly represents your petition?

A. That is a fact.

Q. 33. And the act of the Legislative Council on it?

A. Yes, sir.

Q. 34. Well, did the telephone business, under your administration, grow?

A. Yes, sir; it continued to grow gradually. That was in 1879, late in 1879; you see, we begun and I operated this exchange about four years, nearly, and I sold out with something like four hundred and forty or fifty telephones.

Q. 35. Four hundred and forty or fifty subscribers?

A. Four hundred and forty or fifty subscribers; yes, sir.

Q. 36. Now, in order to connect with your subscribers, as they increased from time to time, was it or not necessary to erect poles upon which to string your wires, so that the exchange could be put in connection with them?

A. Yes; all the time. We added poles continuously and extended our lines as rapidly as we could get subscribers, from this little area of a half mile, say, until we got out a mile, or a mile or two, in several directions.

Q. 37. As I understand it, General Carnes, the exchange, in the beginning, was your individual property—your individual enterprise?

A. Yes, sir.

Q. 38. State whether or not it continued so, or whether a corporation was organized, and, if so, what was the name of it, and whether or not you transferred to that corporation your interest in the exchange, including your rights to occupy the streets and alleys?

A. About a little over a year after I began, I incorporated the Memphis Telephone and Electric Company. I think that was the name of it.

Q. 39. What was the reason for that?

A. Well, primarily, to get more money. The necessity arose for putting in more poles, in lieu of the horses on the housetops. The horses on the housetops became damaged about that time, and damages to houses, etc., were getting too great and it required some additional money for me to get some additional assistance.

Q. 40. You speak of horses being put on the housetops. Explain what you mean by that?

A. Well, I organized the exchange here at Main and Madison, at the State National Bank and the lines extended on the top of that building, and extended to the cross street, and were put on large racks, or horses, on top of the roof, and went down the street, this one (indicating the street), over the Peabody Hotel building, etc., and that was much cheaper than putting poles in the ground. So we began with very few poles and used these horses to extend our lines over the housetops of the other buildings.

Q. 41. You say you found that method expensive; explain why?

A. Because of the constant damage that resulted from the men walking over the roofs, and driving nails in them, and a great many of them were old, and merely walking over them would start a leak, and damages were claimed a great many times that we thought were unjust and uncalled for. But we were helpless, and had to make good.

Q. 42. So you abandoned the method you adopted at the beginning of putting the wires on the housetops?

A. We eventually got off the housetops entirely.

Q. 43. You eventually got off the housetops entirely and went in the streets?

A. Yes, sir.

Q. 44. You found that in developing your exchange you had more money than you had at your individual command, and so you organized the Memphis Telephone and Electric Company?

A. You mean I needed more money than I had at my command?

Q. 45. Did I say you had more money?

A. Yes, sir; you said I had more money.

Q. 46. You needed more than you had at your command?

A. Yes, sir.

Q. 47. Did you get other men to join you?

A. Yes, sir.

Q. 48. What proportion of the stock did you retain?

A. I retained forty-nine per cent. I subsequently sold fifty-one per cent of that stock to Milburn Neely, Jacob Thompson and C. W. Heiskell.

Q. 49. You retained forty-nine per cent of the stock, and sold to these other gentlemen fifty-one per cent, and got fresh money into the enterprise?

A. Yes, sir.

Q. 50. Do you remember what the company was capitalized at?

A. The company was capitalized at one hundred thousand dollars.

Q. 51. Did you transfer to the company all the rights which you had acquired from the city, and the property in which you had invested your individual capital?

A. I did.

Q. 52. That, of course, included the patent right of the Bell Telephone Company?

A. Yes, sir; the contract I had, which was obtained on a royalty basis.

Q. 53. How long did you remain connected with the Memphis Telephone and Electric Company?

A. After the company was organized?

Q. 54. Yes, sir.

A. Little over two years after the company was organized.

Q. 55. What became, then, of your interest?

A. Why, I sold the stock, in 1883, to E. S. Babcock—I think Babcock was of Evansville—and Mr. Barton, of the Western Electric Company, of Chicago.

Q. 56. Do you know what they did with the property after that—after they came into possession?

A. They sold it, in turn, to the Cumberland Company.

Q. 57. To the Cumberland Telephone and Telegraph Company?

A. Yes, sir, Cumberland Telephone and Telegraph Company.

Q. 58. State if you know whether the Cumberland Telephone and Telegraph Company has continuously operated the telephone exchange in the city of Memphis since that time?

A. They have.

Q. 59. And are now doing so?

A. And are now doing so.

Q. 60. Was the telephone exchange continuously operated, from the time you began business in the latter part of 1879, until you sold out?

A. Continuously; yes, sir.

Q. 61. So there never has been any intervention in the operation of the telephone exchange in the city of Memphis, until this time?

Q. 62. Have you interest in the Cumberland Telephone and Telegraph Company?

A. None whatever.

Q. 63. Pecuniary or otherwise?

A. None at all.

Q. 64. Have you ever had any interest in the telephone exchange since you sold out in 1883?

A. None at all.

Q. 65. What kind of switchboard did you use—did the exchange use—during the time that you were connected with it?

A. Well, that was, I guess you would call it, a single line switchboard—very simple, having fifty drops on each, and the lines coming in and connecting on these drops, individual drops.

Q. 66. You had several of these switchboards, of fifty, each?

A. Yes, sir.

Q. 67. As the number of subscribers increased, you had to add switchboards?

A. Yes, sir. I don't know whether it was fifty, or one hundred, but I had several.

Q. 68. Now, in order for a subscriber whose line was fastened to one switchboard to be put in connection with a line fastened to another switchboard, what had to be done?

A. Why, the operator which had the line coming in on that switchboard would simply have to call over and tell this other to give a line, so they could ring and connect with the other party. In other words, they would have to act conjointly.

Q. 69. That was very crude compared with the way the service is given now?

A. Oh, yes; they couldn't operate now with that service. That was before the multiple switchboard, now in use, was made.

Q. 70. A switchboard of that kind could not have been successfully operated with any considerable number of subscribers, could it?

A. It would be impossible to operate an exchange with five thousand subscribers with that kind of switchboard.

Q. 71. Did you find there was an increase in the cost, per subscriber, as the exchange grew?

A. Yes, sir. That is the only business that I know of in which the cost does not decrease proportionately with the increase of business.

Q. 72. Did you not realize that at first?

A. No, sir.

Q. 73. But you found it, from experience, to be true?

A. To be true.

Q. 74. You had no electric lights in Memphis to contend with?

A. Oh, no.

Q. 75. There were no commercial circuits in the city of Memphis?

A. None at all.

Q. 76. When did the first light circuit begin in Memphis?

A. About a month or two, or probably a month and a little over, before we sold out the telephone business. We organized an electric light company, and established a dynamo down here at the elevator, and operated the dynamo from the machinery of the grain elevator, at the river.

Q. 77. In the beginning, did you make any distinction in the price to subscribers, between offices and business houses, and residences?

A. None at all.

Q. 78. None at all?

A. The price was uniform, fifty dollars, at that time.

Q. 79. In other words, each residence telephone was fifty dollars, and each business telephone was fifty dollars?

A. Yes, sir.

Q. 80. A flat rate, without any distinction between the two classes of service?

A. None at all, at that time.

Q. 81. Did you readily ascertain that the business telephones were used very much more frequently than the residence telephones?

A. Oh, very much.

Q. 82. You had no such thing at that time as are called metallic circuits?

A. No, sir.

Q. 83. You used the ground for the return circuit?

A. Altogether.

Q. 84. That was what was called the 'grounded circuit?'

A. Yes, sir.

Q. 85. Which only required one wire?

A. Yes, sir.

Q. 86. The metallic circuit, so-called, is where you use two wires instead of one?

A. Out of the ground; yes, sir.



Q. 87. The high currents of electricity made that necessary, did it not?

A. Oh, yes. I don't suppose it would be possible to operate the grounded circuit now.

Q. 88. But the expense of giving all the kinds of service were very different, was it not, from the service that would be given now? Commercial telephone service that would be given now?

A. Yes, sir.

Q. 89. The conditions were altogether favorable then, and different from what they are at present?

A. That is true.

Q. 90. I believe you say you found it necessary to invest new capital, from time to time, as the exchange grew?

A. Yes, sir.

Q. 91. Do you recollect how many subscribers the exchange had at that time you sold out, in 1883?

A. Well, we had over four hundred. I think four hundred and thirty to four hundred and fifty—somewhere along there, I think.

Q. 92. Now, after you sold your stock to Messrs. Barton and Babcock, how long did they run the property before transferring it to the Cumberland Telephone and Telegraph Company?

A. Well, I knew at the time they bought it that they bought it for the purpose of merging with the Cumberland Telephone and Telegraph Company.

Q. 93. In other words, in a very short time?

A. Yes, sir.

Q. 94. A few days?

A. A few days. I knew, at the time they purchased it, it was the intention of consolidating and putting it with the Cumberland.

Q. 95. With the intention of consolidating and putting it with the Cumberland?

A. Yes, sir.

Q. 96. You have stated, General Carnes, that part of the agreement between you and the Taxing District au-

thorities, was, that they, in consideration of this grant to you, would be allowed to use your poles for their fire alarm system?

A. Yes, sir.

Q. 97. Please state what part of the pole was set aside for that purpose?

A. Well, the top of the pole.

Q. 98. The top of the pole?

A. Yes, sir.

Q. 99. Now, did the city authorities, as a matter of fact, establish upon your poles, whilst you were in charge of the telephone company, as you have already detailed, this fire alarm system?

A. Oh, yes, sir; as rapidly as we could raise the poles.

Q. 100. Please state whether or not, as you extended your pole service, for the purpose of meeting the increased demands from your subscribers, whether the city, at the same time, extended their fire alarm system?

A. Pretty close behind us. They extended, because they had these lines strung on housetops, corners of buildings, etc., and they were very unsatisfactory to them in that way, very hard to maintain, and get at for repairing, etc., and they followed right along behind us pretty well, and occupied that space on our poles, as we would establish our lines.

Q. 101. I find in book 'A,' on page 167, of the minutes of the Taxing District, an ordinance, as follows: 'Section 1. Be it ordained by the Legislative Council that any one giving a false alarm of fire through the telephone or otherwise shall be guilty of a misdemeanor, and upon a conviction before the president of the Board of Fire and Police Commissioners, shall be fined not less than one dollar, nor more than fifty dollars. Section 2. Be it ordained by the Legislative Council, that, whenever any telephone wire crosses or approaches as near as three feet to the wires of the fire department, that the chief of the fire department must be notified before such wire is put up or repaired, and a failure to do so is hereby declared a misdemeanor; and any interference with the fire alarm boxes or telephones or wires is hereby declared a misdemeanor; and any one found offending therein shall, upon conviction before the president of the Board of

Fire and Police Commissioners, be fined not less than one dollar, nor more than fifty dollars, for each and every offense.' Do you know anything about that ordinance, General Carnes?

A. Yes, sir.

Q. 102. Please state what you know of it?

A. Well, that ordinance was passed before I knew of it. I attended a meeting of the council and protested against that ordinance, and notified them that, as we had given them the right to run a line on our poles, we could not afford to recognize their right to prevent us from working on our poles, and I did not care to subject myself to the charge of a misdemeanor, but that we would continue to string our wires and work on our poles, and I hoped not to have our men arrested or molested, and if they did, I would simply litigate the matter with them. Well, they discussed that, and some of the members of the council thought that my position was just and right to myself, and they dropped the matter, and simply said: 'Well, notify the chief of the fire department, as well as you can, where you are working,' to which I said: 'We are liable to work on Main street, Central alley and Second alley, and this street, and that.' At any rate, the matter was simply dropped, and I never gave any notice after that and they never interfered with us.

Q. 103. You say that, at the time they put up—at the time the city authorities put up its fire alarm system over the poles of your company—on the poles of your company, and on the top of the poles——

A. (interrupting). Over our lines.

Q. 104. Over your lines there were only one or two wires?

A. Yes, sir. They simply had one circuit around to these various fire engine houses. They have very much enlarged it, and put in the new Gamewell system since then, and multiplied the number of wires, and extended their boxes very much.

Q. 105. Please explain what the theory of this fire alarm is; you speak of the boxes used.

A. Well, for instance, it is very similar to this little telegraph call we have here. In various places in the city, throughout the city, there are the fire alarm boxes,

in the neighborhood, like at my corner, for instance. I have a key given me, and in case of alarm, I can go and unlock that box, and pull down the—just like this, you see, and it registers in the engine house the number of that box—indicates where the fire is.

Q. 106. And those boxes are now scattered all over the city, are they?

A. Yes, sir.

Q. 107. So that the object of it is to notify the city or the policeman to give a prompt alarm of fire to the fire department?

A. Yes, sir.

Q. 108. And to locate it so they can know just where to go?

A. Yes, sir; in order to protect themselves, as well as possible, from false alarms, after you once insert the key and open the box, you can't take it out. The electrician or fireman has to unlock that box. The electrician has to pull that out again. They have to use the private party's key to take out that key and lock the box with.

Q. 109. Has it been found to be of real value to the fire department?

A. It has. It is necessary in every city.

Q. 110. Do you know anything about the police signal system, which, I am now informed, is now also on the poles of the Cumberland Telephone and Telegraph Company?

A. Yes, sir; I know that. That was inaugurated since the disposal of my interest in the telephone company, but I know that it exists, and it is also on my corner—on a pole at my corner. A police telephone box remains locked, and they are only to be opened by the police or the officers that carry keys for them. There is one here at the State National Bank corner and various others scattered through the city.

Q. 111. What is the value of that?

A. Well, that has the double purpose of answering for trouble and also an additional fire alarm, because they can talk through it, and give better information, if a policeman happens to be near—to communicate directly and immediately with the station house.

Q. 112. You mean, in the police station.

A. Yes, sir. That is arranged like a miniature telephone exchange. They give these box numbers, and the number of the drop corresponds.

Q. 113. Does that increase the efficiency of the police department?

A. Oh, very materially.

Q. 114. Was there any such thing as the police signal system in operation during your time?

A. No, sir; that has been perfected, inaugurated since that time.

Q. 115. That was, therefore, not included in your contract with the city?

A. No, sir. It was not known at that time. In other words, that is a telephone, and something that has been brought out since.

Q. 116. Have you a copy in your possession of the original petition which you filed with the Legislative Council of the Taxing District of Shelby County, Tennessee, in which you asked for the franchise to operate a telephone exchange, and put poles and wire in the streets and alleys of the District?

A. No, I do not think I kept a copy. I assumed that, like all documents of that kind, that would always be a matter of record at the city hall, and I do not think I kept a copy. At any rate, I haven't it. I haven't any books of the old company.

Q. 117. What became of the books?

A. They were transferred over to Mr. Babcock and Mr. Barton. I have no idea what became of them. When I sold, I simply turned the office, books and everything over to them and walked out.

Q. 118. I understood you to say in a former part of your deposition that the poles that were set in the ground and the wires that were strung through the city was done under the supervision and direction of the city authorities?

A. Yes, sir. They did not in every instance designate where the individual poles were to be set, but they generally say upon which side of the street we were to set

these poles and confine ourselves, as nearly as possible, to the street corners and we were cautioned not to set a pole to the detriment of the occupants of the street, immediately in front of their gates, but if we had to set a pole between street corners, why, to confine ourselves, as nearly as possible, to the front of the dividing line between the properties. Those were the general instructions that we had at the time.

Q. 119. Well, did they generally have a man who supervised all of that?

A. Yes, sir.

Q. 120. What was that?

A. That was the city engineer."

#### CROSS-EXAMINATION FOR THE COMPLAINANT.

**By Mr. James L. McRee:**

"Q. 1. General Carnes, at the time the telephones were installed by you, I understand you to say that there were two or three private lines in the city of Memphis, at that time?

A. Yes, sir.

Q. 2. Were those lines connected by wires strung on poles located in the city of Memphis, and on their streets and alleys?

A. I don't recollect whether there were any poles, or not, but most of them were just carried through on the housetops.

Q. 3. The wires crossed the streets, though, at that time?

A. What?

Q. 4. The wires crossed the streets at that time, even when strung along the housetops?

A. I reckon so, yes sir, yes, sir.

Q. 5. Now, this petition that was presented by you, in December, 1879—you say you have no copy of that?

A. No.

Q. 6. What was the substance of that petition?

A. The substance was that the notification I was going to establish a telephone business for public service, and, for the purpose of doing that business, I asked the council to grant me permission to occupy, or to put poles and lines in the city of Memphis.

Q. 7. You did not specify any particular streets or alleys, did you?

A. No.

Q. 8. And your petition did not contain anything with reference to time?

A. No.

Q. 9. No reference was made, either limiting the time or making the franchise perpetual?

A. No reference to time was specified.

Q. 10. Who composed the council at that time?

A. Well, there was, I think—Dr. Porter was president, and there were Mr. Overton, Mr. Gunn, Mr. Goyer, and I am not certain whether Mr. Goodbar was at that time or immediately afterwards, but I think it was Mr. Goodbar, and Mike Burke was one of them, and I think Lyman Wallace.

Q. 11. Was this council composed of two departments, or one department; that is, were there two boards, or one board?

A. Two boards. They met in joint session, however, and divided into what was called Police and Fire Commissioners, and a Board of Public Works. They always met as one body.

Q. 12. You, of course, were present when this petition was taken up and considered?

A. Yes, sir.

Q. 13. What action did the board take in regard to it?

A. Well, as I stated, it was first referred to a committee of three, and reported at the next meeting.

Q. 14. Reported at the next meeting?

A. Yes, sir. I was present when I presented the petition and I was present when it was granted.



Q. 15. Was there any opposition to your request?

A. None at all, only that incredulity I spoke of. A joke with them seemed to pass around, that I was playing with a toy, and they seemed to be sorry for me, but, if I had the nerve to undertake something that looked as ethereal as that seemed at that time to them, they would grant it, with the only reservation that it was not to be a monopoly—because, if I failed, somebody else might come along and want something better and get the use of the streets. The only restraint was—they said it should not be a monopoly.

Q. 16. They seemed to think that you would not last very long?

A. No. They seemed to think that this was not a practical business proposition; that it looked too new—too much like a plaything, or toy. While I had a great deal of confidence in it, I never realized to what extent it was going myself. No, it was passed by a unanimous vote.

Q. 17. That was taken up just as any other proceedings, on motion, and was adopted in that way?

A. Well, the petition, as I said, was referred to a committee of three and they made their report and recommended it, and that was adopted and the grant given by unanimous vote.

Q. 18. At first, I believe you state, the telephone wires were strung across the houses, to a large extent?

A. To a large extent, yes. We had to put up some poles right away, but, as I said, our practice, in the beginning, was, acting upon the supposition that I could give more telephones, for less money, I got these telephones and used the housetops, and benches or horses, to string the wires in that way, which we had to pull down subsequently, entirely.

Q. 19. Where were your first poles located, General?

A. Well, we begun from the corner of Main and Madison street, and went in various directions. Our exchange, or central office was then established above the State National Bank, on the corner of Main and Madison street.

Q. 20. That was the heart of the city at that time?

A. Oh, yes; just the same as it is now.

Q. 21. Under whose directions were the poles erected?

A. Under my direction.

Q. 22. For the company?

A. For the company, and the city engineer, on the part of the city.

Q. 23. Who was the city engineer at that time?

A. Bell, I think—Niles Merriwether first, and then Bell, I think—I don't remember which. I worked under both of them. At times, too, for some reason, the chief of the fire department was even delegated—I imagine by the city engineer, and when we couldn't get him we used to sometimes talk to the chief of the fire department about the location of these poles.

Q. 24. Was there anything in your original petition with regard to the privilege to the city to string its fire alarm wires over the poles of your company?

A. That was in the original grant, yes, sir—the condition of the grant. My petition was granted with the stipulation that I should give the city telephones at half rate, and allow the top of the poles—the wire or wires, on the top of the poles for the use of the fire district, or the fire alarm service.

Q. 25. Have you referred to the petition you speak of since it was presented to the council in 1897—for the purpose of refreshing your memory?

A. Well, it has often been referred to.

Q. 26. When was the last time that you saw the original petition, or a copy of it?

A. I never did see it after it was granted.

Q. 27. The reference to it, then, was verbal.

A. Oh, sure; just merely verbal.

Q. 28. You undertake to state the contents of that petition only in a general way, do you?

A. Well, I stated the purport of that petition, while I don't offer to state the exact verbiage of the contents.

Q. 29. Upon your original examination, there were a number of inquiries made relative to certain minutes or entries contained in the books of the city of Memphis.

Have you examined those entries yourself, and do you undertake to testify to their correctness in any way?

A. No; I have not examined the original entries since, but I recollect the occurrences very distinctly. For instance, I have a very distinct recollection with regard to that ordinance passed with reference to interference with the fire alarm wires. In fact, I called General Wright's attention to that fact a few days ago, and told him he could find it.

Q. 30. At the time you sold out the company to the gentlemen from Evansville and Chicago, how many poles did you have erected in the city of Memphis?

A. Oh, I couldn't say as to that. I only remember that we had something in the neighborhood of four hundred and fifty subscribers.

Q. 31. At that time, had you extended your poles outside of the city limits, or not?

A. Yes, sir; in some cases we had. The city limits were very much prescribed at that date. For instance, Mr. Montgomery's house was quite a distance out of the city limits. The city limits on the east was Dunlap street, at that time, and his house was a considerable distance beyond that. One of the first lines we ran was to his house—among the first, I mean. The southern boundary of this city was, at that time, Calhoun street. We had gone beyond that limit, and I remember the mistake I made in putting up cypress poles on Main street. I didn't have much experience at that time, and in our endeavor to put up poles with as little cost as possible, we went down Main street, and when we came to a good size tree, we would go across the street and come back when we would strike a tree on the other side. We would go across and come back. The following winter, the second winter, I believe, we had a great freeze, and a result of that, we lost four or five of our poles. They fell across Main street, by reason of zig-zagging, to get around those trees. The telephone folks don't do that these days because it is against policy, and we lost several poles, going down Main street, cypress poles, and better than the Memphis telephone has now."

## REDIRECT EXAMINATION.

By General Wright:

"Q. In looking over your former evidence since it has been written out in long hand from the stenographic notes, I observe that your evidence leaves it somewhat uncertain as to whether or not, in your original petition to the City Council, in December, '79, as to the contents of which you testified, you proposed, if the rights of way through the streets and alleys were given you, to give the city, for half price, such telephones as the authorities desired, and to allow them the top cross arm for their fire alarm system. Will you be good enough to say how this is? In other words, what I want to know is, whether this was in the original petition?

A. My recollection is that it was."

## RECROSS-EXAMINATION.

By Mr. McRee:

"Q. General Carnes, can you state with certainty whether that provision was in the petition as originally submitted by you or whether it was a requirement made by the committee to whom it was referred?

A. Not positively, but my recollection is that the petition as presented was granted, and my memory has been refreshed by noting in the minutes of the council showing that the petition was granted.

Q. Do you recollect whether the requirement with reference to the use of the poles for the fire alarm system was made at the time the first right, or first petition, was granted, or whether that was taken up after you began to use the poles in the streets, rather than the horses upon the housetops?

A. I am not positive, but my impressions are that, and I am rather confident that the conditions were made in the original petition.

Q. General Carnes, from your former examination I see that the Memphis Electric Telephone Company was

capitalized at \$100,000, and that you owned forty-nine per cent of the stock, and that fifty-one per cent was owned by other parties. Now, I ask you to state what amount was paid by Babcock and Barton to the holders of this stock for the same?

A. Well, I could not tell you positively; the offer first made to me was par for my stock; after they had bought this fifty-one per cent, why, then they gave me eighty cents, that is the most I could get for it.

Q. Holding forty-nine per cent of the stock, how much did you receive for that amount?

A. Eighty cents on forty-nine thousand dollars.

Q. How much would that be?

A. \$39,200.

Q. Do you know the parties holding fifty-one per cent of the stock received more than par for their stock? Did you learn the facts so as to say whether they received exceeding that amount?

A. No; I never learned anything about it; it was a very sore subject to me, and we never discussed it after that. You see here, however, this I know, that Messrs. Babcock and Barton had obtained all that is known as the ex-territorial franchise in the State before I was aware of this, so that having been deprived of all such privilege, I was naturally at a disadvantage with them; they could run into Memphis from the suburban towns, and so forth, whereas our franchise limited it to Memphis and to residences contiguous to Memphis.

General Wright: You mean by your franchise with the Bell Telephone Company?

A. Yes, sir; they had surrounded us; therefore, they had us at a disadvantage; we did not get near so much for the exchange in Memphis as we would had we controlled the ex-territorial lines in this part of the State."

And the further deponent saith not.

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Office Supreme Court, U. S.  
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OCT 27 1910  
JAMES H. McKENNEY,  
Clerk

IN THE  
Supreme Court of the United States

No. 42.  
OCTOBER TERM, 1910.

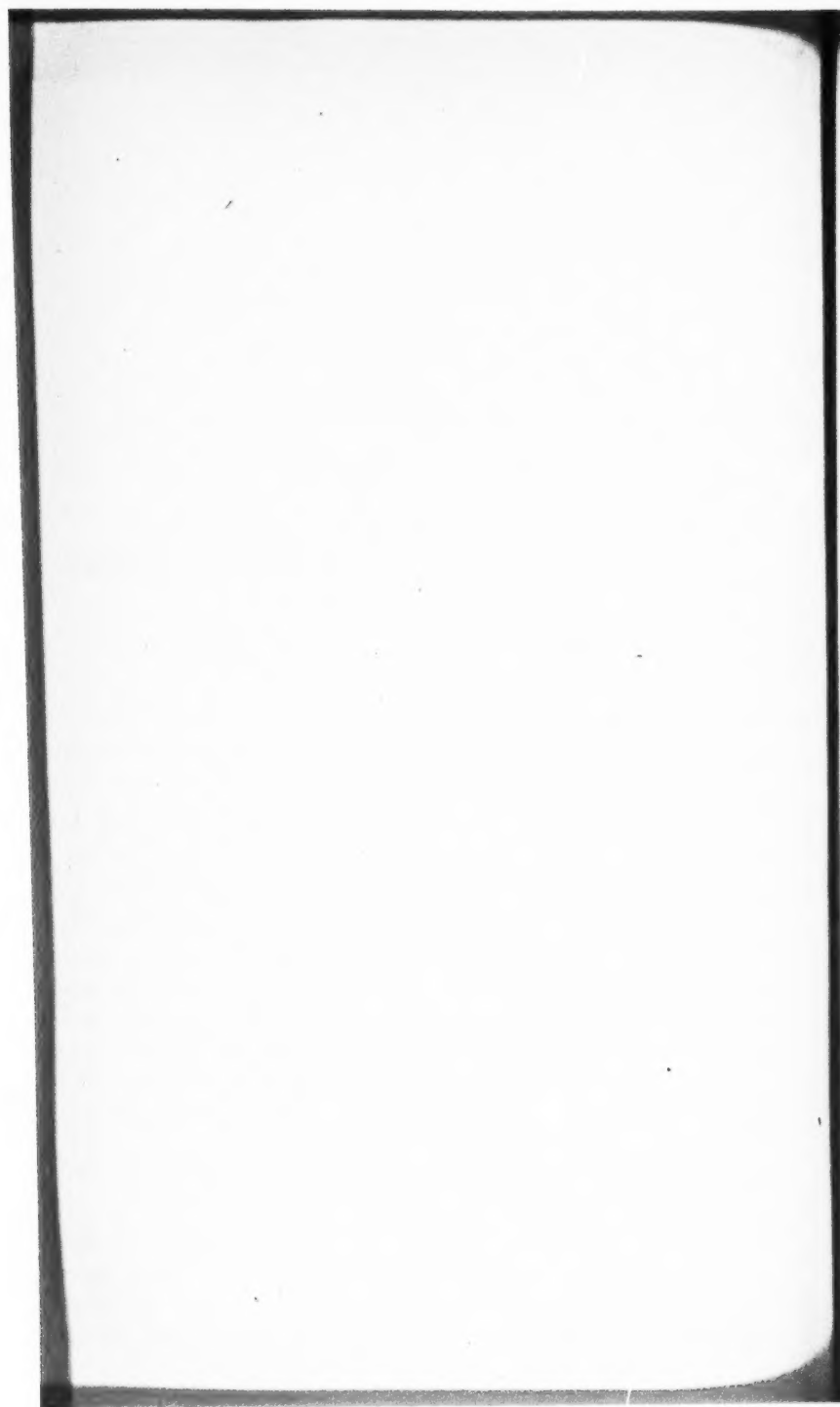
THE CITY OF MEMPHIS, . . . . . Appellant,

vs.

CUMBERLAND TELEPHONE AND TELE-  
GRAPH COMPANY, . . . . . Appellee.

BRIEF FOR APPELLEE.

LUKE E. WRIGHT,  
ELDRIDGE E. WRIGHT,  
WILLIAM L. GRANBERRY,  
Solicitors for Appellee.





No. 42.

OCTOBER TERM, 1910.

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CITY OF MEMPHIS, Et Al.

vs.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

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*May it Please Your Honors:*

This suit was instituted to prevent the enforcement of an ordinance of the City of Memphis, undertaking to fix maximum charges for telephone exchange service in Memphis, Tennessee.

It was charged in the bill that the City of Memphis had no authority under its charter to adopt an ordinance regulating telephone charges; and, that "said ordinance is null and void because it is unjust, inequitable and unreasonable in that it fixes the maximum rates and charges beyond which your orator is forbidden to go under severe penalty, which is so low that your orator could not operate its exchange without actual loss of money to it; and, indeed, is in truth and effect confiscatory in that it totally destroys the value of your orator's plant in the City of Memphis for profitable use as a telephone exchange."

There were other grounds in the bill upon which an injunction was sought, but need not now be considered.

The bill set out a history of Appellee's telephone exchange in the City of Memphis, and the various contracts and dealings with the city authorities, for the purpose of substantiating its claim of a legal right to exist in the City of Memphis, as that

was one of the serious questions in dispute at the time the bill in this case was filed.

But, as frankly stated by our adversary in his brief, that question has since the institution of this suit been determined by the Supreme Court of Tennessee, and is no longer in dispute in this case. It is now admitted by our adversary that Appellee is rightfully operating its exchange in the City of Memphis by reason of its contractual relations with the city authorities.

The remaining questions in the case are:

FIRST: Has the City of Memphis the authority to regulate rates and charges for telephone exchange service in the City of Memphis; and,

SECOND: Conceding such authority, has it been exercised in a lawful or unlawful manner.

### I.

Before discussing the merits of the case, the right of Appellant to bring the case to this court will be considered.

The ground of jurisdiction in the court below was diversity of citizenship, and not a question involving the construction or application of the Constitution of the United States, nor was any claim set up under the Constitution of the United States.

In the brief of our adversary it is several times stated that it is charged in the bill that the rates prescribed by the ordinance were so unreasonably low that it was "a taking of private property for public purposes without due compensation or due process of law, in violation of the Fourteenth Amendment of the United States Constitution." But our adversary is in error. No such claim was set up in the bill, nor, indeed, could any such claim have been made.

It is true that the bill did claim that the rate ordinance was unreasonable, and, in effect, confiscatory, in that it would totally destroy the value of Appellee's plant for profitable use as a telephone exchange; but this claim arose under the Constitution of Tennessee, and not under the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States is directed exclusively to *State* action, while the Constitution of Tennessee is directed to all agencies or instrumentalities of government, and is not confined, as is the Federal Constitution, to *State* action.

Appellee in its bill not only does not set up any claim of protection under the Federal Constitution, but negated any idea of such claim or protection, since it specifically charged that the City of Memphis was without authority from the State to enact the ordinance in controversy, and having made that averment, which it still insists upon, it could not consistently thereafter set up a claim of protection under the Fourteenth Amendment.

Article 1, Section 8, of the Constitution of Tennessee provides: "That no man shall be taken or imprisoned, or disseized of his free-hold liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

In *Harbison vs. Knoxville Iron Co.*, 103 Tenn. 421, it is held that "the law of the land" is the exact equivalent of the term "due process of law," as used in the Federal Constitution.

It was, therefore, to the State and not the Federal Constitution that the bill in this case referred.

His Honor, Judge Clark, in granting a temporary injunction, said:

"In the first place, I conclude that the City of Memphis is without any legal authority to regulate rates in the

method attempted to be done by this ordinance. It is very true that the able solicitors for the city refer to very sweeping and general language in the delegation of authority to the Legislative Council of the city, the precise language referred to being as follows:

'Be it further enacted, That the Legislative Council shall have power to pass, for the government of the city, any ordinance not in conflict with the constitution or laws of the United States or the State of Tennessee.'

This must be construed as having reference only to the ordinary powers and authority exercised by municipal corporations, and such as are ordinarily conferred on them. This language, general as it is, could not be properly construed as authorizing the city to enter upon such an unusual and exceptional subject as that of rate regulation by a municipal corporation. Such a power does not arise by implication, but must be expressly conferred, or must be positively necessary to the exercise of a municipal power which is itself expressly delegated. That is not the case here, and I really think it is very clear that the City is without authority to adopt and enforce the legislation found in the ordinance called in question in this case."

The case on final hearing was decided by His Honor, Judge Evans. In his opinion he states that, without dissenting from Judge Clark's view, which he had not had time to examine, he rests his decision upon the proposition that the rates prescribed are confiscatory and destructive of Appellee's rights under the Constitution of the United States.

The question, therefore, is whether, where neither of the parties to an action either sets up or relies upon the Federal Constitution, the trial judge may, by his decision, change the appellate jurisdiction from one court to another. In this case appellee instituted the suit claiming jurisdiction upon a diversity of citizenship, and neither set up nor relied upon a Federal Constitutional question; the Appellant neither set up nor relied upon a Federal Constitutional question, yet the appeal is taken to this court.

If, therefore, this court maintains its jurisdiction, we will

have a case decided by this court, which neither raises nor depends upon a Federal Constitutional question.

## II.

Assuming the jurisdiction of the court, the first question for discussion is whether the City of Memphis had the power under its charter to regulate rates for telephone exchange service.

The City of Memphis was organized under Chapter 11, Acts of 1879, and its charter was thereafter amended at the sessions of the Legislature in 1903 and 1905, so that for the purpose of determining the powers of the city we must look to:

Acts of Tennessee, 1879, Chapter 11;  
Acts of Tennessee, 1903, Chapter 366; and  
Acts of Tennessee, 1905, Chapter 54.

The only parts of these Acts which it is insisted by our adversary confers legislative authority upon the City of Memphis to regulate telephone exchange rates are:

Sections 3 and 4 of Chapter 11, Acts of 1879. Section 3 is as follows:

*"Be it further enacted:* That the local government established by this Act shall have power to establish work-houses and houses of correction, to declare by local laws, what acts shall be misdemeanors, and when committed within the taxing district, to punish the offenders by fines and forfeitures, and by imprisonment and labor, within and without the workhouse, in default of payment of the fines imposed as punishment; to cause the arrest of all vagrants, tramps and drunken and disorderly persons, within the taxing district, and provide for the punishment of the same in the manner above provided; to prohibit by fine the introduction of paupers into the taxing district by steamboats, railroads, or other carriers of persons; to regulate and suppress disorderly houses and houses of ill fame; to regulate and suppress gaming houses, and punish gaming by fine and imprisonment; to arrest and confine for trial, or take forfeit for the appearance for

trial, of all persons charged with offenses which are punished as misdemeanors by the laws of the taxing district.

"All necessary judicial authority is hereby vested in the President of the Board of Fire and Police Commissioners, to hear and determine all cases of offenders against the ordinances or local laws of said taxing district, and to impose fines, or to commit such offenders when found guilty under the said ordinances or local laws of said taxing district, said government shall have the power to pass all laws to preserve the health of the taxing district; to define, prevent and remove nuisances within the taxing district, and for a distance of one mile outside of same; to make quarantine laws and enforce the same within ten miles of the taxing district; to prevent the introduction of contagious diseases into the taxing district; to establish and regulate hospitals in accordance with the present laws of the State; to prohibit the erection of soap factories and slaughter pens, or factories or houses for curing green hides, and all hides of like character. They shall have power, and it shall be their duty to condemn as nuisances all buildings, cisterns, wells, privies, and other erections in the taxing district, which, on inspection, shall be found to be unhealthy, and to cause the same to be abated, unless the owners thereof, at their own expense, upon notice, shall reconstruct the same in such manner as shall be prescribed by the laws of the taxing district; and as all buildings, cisterns, wells, privies, and other improvements to be constructed in future, they shall have the power, and it shall be their duty to have the same so constructed as not to interfere with the health of the taxing district. They shall have power, and it shall be their duty, to provide that the taxing district is from day to day, and every day, kept in a clean and healthy condition; that the yard and premises of every occupant of any dwelling, out-house, office, store, shop, or other place of business, including the cellars, and other places having unhealthy material, are cleaned and so kept by such occupant every day, at his own expense; and to prohibit by proper laws and penalties every such occupant from throwing or putting any trash or improper material in the streets, alleys or side-walks, except for the purpose of removal; to require such occupant, daily, to deposit all unhealthy material in the street near by, in some suitable vessel, to be provided by the occupant by his or her own expense, to be carried off by the public carts, and rendered harmless; to compel lot owners to make safe and proper side-walks of brick or plank adjoining their lots; to designate and establish

fire limits, within which wooden buildings shall not be erected; to prevent the erection of buildings dangerous to other improvements, and to remove them when erected without their consent; to regulate the manner of building of partition walls, parapet walls and partition fences; to regulate fire-works, stove-pipes and flues in all shops, kitchens and other like places; to regulate the keeping and storing of gunpowder, coal oil and other combustible articles, and to prevent the same from being stored within the limits of the taxing district, or within one mile of the same; provided, that side-walks shall not be required to be laid down on any street until the same has been graded, curbed and guttered with brick or stone, by the Board of Public Works. They shall have power to make, preserve and improve steamboat and flatboat landings, and all wharves within the taxing district; to regulate the anchorage and mooring of boats and other water crafts at landings in the taxing district, and to prohibit or regulate wharf boats; to establish inspection laws, for the inspection, weighing and measuring of all kinds of provisions, provender and fuel for man and beast, and to provide for the gauging and inspection of all kinds of liquors and illuminating oils, but no charge shall be made for testing any measure, article or vessel for which a fee has once been paid to any officer acting under and by authority of this Act, and having on said measure, article or vessel a stamp or brand of an inspection officer. To permit and regulate the laying of railroad tracks or iron, and the passage of railroad cars through the taxing district, and to remove such railroad track if it obstructs travel or does not conform to the laws of the taxing district; to make all suitable and proper regulations in regard to the use of the streets for street cars, and to regulate the running of the same, so as to prevent injury or inconvenience to the public, to forbid the opening and digging up of the streets by gas or water companies to the public detriment; to regulate wells, cisterns, hydrants, and fire-plugs, and to convey water into the taxing district from the vicinity; to establish and regulate markets and market houses; to make provisions for lighting streets, alleys and other public places in front of churches, jails and other public buildings in the taxing district, and to erect all necessary public buildings; *to repair, and keep in repair, streets, side-walks, and other public grounds and places in the taxing district; to open and widen streets, to change the location or close the same, and to lay off new streets and alleys when necessary; and to have and exercise entire control over all streets and other public property of the*



*taxing district, as well that within as without the taxing district. And they shall have power over all other affairs in the taxing districts in which the peace, safety or general welfare of the inhabitants is interested."*

That part of Section 3 relied upon by our adversary is designated by italics.

Section 4 is as follows:

"Be it further enacted: That the Legislative Council, as established in Section 2 of this Act, shall be vested with the power and charged with the duty of making all laws or ordinances not inconsistent with the general laws, for every object, matter and subject within the local governments instituted by this Act. Said Council shall convene, when required to do so by the Chairman of the Board of Fire and Police Commissioners; shall have power to elect a presiding officer, to adopt rules for the government of its proceedings, and may adjourn and meet at its pleasure. The Secretary of the Board of Fire and Police Commissioners shall act as Secretary of the Council, record its proceedings, and preserve its records and documents; he shall also be Clerk of the Board of Public Works. The powers of the Legislative Council are restricted to the business alone of making ordinances or local laws, for the taxing district, except as hereinafter provided."

All that is claimed from the Acts of 1905 is one sentence taken from Section 21, which is "that the Legislative Council shall have the power to pass, *for the government of the City,* (italics added), any ordinance not in conflict with the Constitution or laws of the United States, or of the Constitution of Tennessee."

That part of Chapter 366 of the Acts of 1903 pertinent to this suit is Subsection 1 of Section 1, which reads as follows:

"The Legislative Council of such taxing districts is hereby vested with the power and authority to fix and regulate from time to time within reasonable limits the scale of charges for the product or service of all district telegraph companies, gas companies, electric light and power companies, street car companies, belt line compa-

nies, switching companies, now or hereafter enjoying or operating any rights or privileges to use or occupy any of the streets, alleys or public grounds within the territory of such taxing districts."

The construction placed upon the charters of municipalities in Tennessee is sufficiently shown by a quotation from *Link vs. Nashville*, 80 Tenn., 504, where it is said:

"In looking to those provisions of the charter to see if the power to pass the ordinance in question is conferred in them, or either of them, we are to be governed by the following rule of construction: 'It is a general and undisputed proposition of law,' says Judge Dillon, 'that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in EXPRESS WORDS; second, those NECESSARILY OR FAIRLY IMPLIED in OR INCIDENT to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, and not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract, or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void.' 1 *Dill. Mun. Cor.*, p. 173, and the numerous authorities cited by him in support of these propositions. According to Judge Cooley, 'The powers of these corporations are either express or implied. The former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant.' *Const. Lim.*, 235. 'The general disposition of courts in this country has been to confine municipalities within the limits that a strict construction of the grants of those powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations. The reasonable presumption is, that the State has granted in clear and unmistakable terms all it has designed to grant at all.' *Ib.* 235-6."

To the same effect are:

*Woolward vs. Nashville*, 108 Tenn., 360;  
*Jones vs. Nashville*, 109 Tenn., 558;  
*Pepper vs. Railroad*, 113 Tenn., 58;  
*Railroad vs. Railroad*, 116 Tenn., 502.

The decisions of this court are to the same effect as the Tennessee decisions.

In *Bennett vs. Denison*, 145 U. S., 139, it is said:

"It is the settled doctrine of this court that municipal corporations are merely agents of the State government for local purposes, and possess only such powers as are expressly given or implied as becomes essential to carry into effect such as are expressly granted."

In *Ottawa vs. Cary*, 108 U. S., 110, it is said:

"Municipal corporations are created to obey the State government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. (1 *Dill. Mun. Corp.*, Sec. 89, 3d Ed., and cases cited.) To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect."

To the same effect are:

*Whitman vs. Clark*, 103 U. S., 256;  
*Hill vs. Memphis*, 134 U. S., 204;  
*Fort Scott vs. Eads Brokerage Co.*, 54 C. C. A., 440.

Without an exception the authorities are uniform in holding that *express authority* must be delegated by the Legislature to a municipality before it can enter upon the important function of regulating rates and charges of public service companies:

*Tacoma Gas, etc., vs. Tacoma*, 14 Wash., 288;  
*State ex rel vs. Sheboygan*, 111 Wis., 23;

*McQuillin on Municipal Ordinances*, Sec. 50, p. 78;  
*Dillon on Municipal Corporations*, Vol. 1, p. 392, Sec. 315;  
*St. Louis vs. Bell Telephone Co.*, 96 Mo., 623;  
*Jones on Telephone and Telegraph Companies*, Sec. 19 and  
 Sec. 234;  
*Joyce on Electric Light*, 2d Ed., Vol. 2, Sec. 525;  
*Chamberlaid vs. Iowa Telephone Co.*, 119 Iowa, 619;  
*Old Colony Trust Co. vs. City of Atlanta*, 83 Fed., 39;  
*Lewiston Natural Gas Co. vs. Indiana*, 135 Ind., 49;  
*In re: Pryor*, 55 Kansas, 724;  
*Knoxville Water Co. vs. Knoxville*, 107 Tenn., 678;  
*Los Angeles vs. Water Co.*, 177 U. S., 570;  
*State, etc., Co. vs. Newark*, 49 N. J. L., 344.

This rule is no where better stated than in the case of *State ex rel. vs. City of Sheboygan*, 111 Wis., 39, where it is said:

"No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. *Michigan T. Co. vs. Benton Harbor*, 121 Mich., 512. It has no authority to impose other conditions. That power rests in the Legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail. *St. Louis vs. Bell T. Co.*, 96 Mo., 623."

When the Legislature in 1903 expressly delegated to the City of Memphis the right to reasonably regulate the charges for certain services in the City of Memphis it was a clear recognition that the general language of the charter theretofore granted did not give any such power to the city.

And it is equally clear that the language of the Act of 1905 in which the Legislative Department of the city was given the power to pass ordinances *for the government of the city*, there was no legislative intent or purpose to grant the power to the

city to regulate the charges of public service companies. It was intended, as it states, merely to enable the city to pass any ordinance for the government of the city, but not for the government of any other concern.

So that we insist that it is manifest that the City of Memphis had no authority under the general language of its charter or amendments to regulate the rates for telephone exchange service.

It is equally clear that the express authority to the city to regulate the charges of certain concerns excludes the idea that the city was given the power to regulate the charges of other concerns. It is insisted that a district telegraph service includes telephone exchange service. Whatever may have been thought of this question at the time the telephone was new and little used, there can be no question that in recent years the distinction between a telephone exchange giving local telephone service and service afforded by a district telegraph concern is well understood, and no Legislature would in recent years call a telephone exchange a district telegraph.

However, the question has been put at rest both in this court and in the Supreme Court of Tennessee:

*Richmond vs. Southern Bell Telephone Co.*, 174 U. S., 761;  
*Home Telegraph Co. vs. City of Nashville*, 118 Tenn., 1.

Therefore, it is insisted that the City of Memphis not having the authority or power under its charter to regulate the charges for telephone exchange service in the City of Memphis, the ordinance in question is void, and its enforcement can be enjoined.

### III.

If, however, we assume that the City of Memphis has been given the power by the Legislature to regulate charges for tele-

phone exchange service in the City of Memphis, we still insist that this authority has not been exercised in any reasonable manner, but to enforce the ordinance would be destructive of Appellee's property rights in the city.

The answer, which is sworn to by James H. Malone, Mayor, admits that it was the intention and purpose of the city authorities to enforce this ordinance against the Appellee.

It is settled law in Tennessee that even where a municipality is given *express* authority to regulate the prices to be charged by a public service company, such power must not be exercised arbitrarily and unreasonably, and that where the rates are so reduced as to become oppressive on the company *and will not yield a fair income on the investment*, the court will restrain the enforcement of the ordinance.

In *Knoxville vs. Knoxville Water Company*, 107 Tenn., 691, the Court says:

"We are of opinion that the right to regulate rates was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right under the terms of the charter, but not to be exercised arbitrarily and unreasonably, and when rates are so reduced as to become oppressive upon the company, and so as not to yield a fair income on the investment, the court can interfere upon a proper showing and restrain such action. As has been very tersely said: A reasonable rate the law assures, even against governmental regulation."

This, then, is the test to be applied to the ordinance involved in this case.

It is shown, without contradiction, by the President, and until recently, the General Manager of Appellee, and who has been such since 1885, that Appellee's plant in Memphis has cost to November 30th, 1907, \$1,125,968.76, and that it could not be duplicated for a less amount. Trans., p. 88. He also says that

the net profit for the year 1902 was 6.13 per cent; 1903, 2.73 per cent; 1904, 3.14 per cent; 1905, 4.54 per cent; 1906, 2.97 per cent; and for the year 1907, to November 30th, at the rate of 2.56 per cent.

These figures are sustained by the Auditor, who has been such for more than ten years. Trans., p. 129.

This is the entire proof upon the cost, value and profit of Appellee's plant in the City of Memphis.

It is also shown by the Auditor that the reduction in rates prescribed in the ordinance in controversy, within the corporate limits, would result in a reduction in rates of almost twenty-six thousand dollars per annum (Trans., p. 130), and which was in excess of the net profit for the year 1907, which was \$23,390.39. Trans., p. 147.

There is no controversy as to the correctness of these facts, but Appellant has undertaken to destroy their force by showing telephone rates charged by different companies in various cities throughout the country, but no effort is made to contradict or vary the statement made by the President and General Manager and the Auditor of Appellee.

An examination of all the cases before this court in recent years shows clearly that *each case*, in its last analysis, was decided upon the question of net profit, and this is notably true of the last two cases before this court, to-wit:

*Knoxville vs. Knoxville Water Co.*, 212 U. S., 1;  
*Wilcox vs. Consolidated Gas Co.*, 212 U. S., 19.

If, therefore, net profit is the test, there is no doubt of the invalidity of the ordinance in this case.

If the rule of property in such cases as announced by the Supreme Court of Tennessee is to apply, then it can not be said that less than three per cent net return on a telephone invest-



ment is reasonable, much less a reduction in rates which entirely wipes out all net returns.

Various exceptions are urged by opposing counsel to the figures given by Appellee's officials, but when analyzed they are not sustained by anything in the record, and if exception was to be taken to any of these figures full opportunity was tendered the city's counsel and refused. These objections will be noticed later herein.

This ought to be sufficient to show the unreasonableness of the ordinance, whether the rule of confiscation be applied, or the Tennessee Rule, of a fair return upon the investment.

The peculiar nature of the telephone business seems to have been entirely overlooked by the City of Memphis in fixing telephone rates. All that is claimed for the city in investigating telephone rates, prior to the passage of this ordinance, is that a committee was appointed to frame an ordinance fixing a reasonable rate, that this committee informed itself as to rates charged by various telephone companies in the principal cities of the United States, and that upon this investigation the committee prepared the ordinance in controversy. An examination of the books and records of Appellee was tendered the city and refused. Trans., pp. 211-2.

The proof in this case with respect to telephone rates charged by other companies at other places can not be useful for any purpose in this case. The mere statement that another company charges less rates at some other place proves nothing with respect to the reasonableness or unreasonableness of the rates of the particular company under consideration. It was unnecessary for Appellant to go elsewhere to find different rates being charged, since the record shows that in the City of Memphis there is another telephone company charging for a business telephone \$4.00 net per month against Appellee's charge of \$7.00

per month, and \$2.50 for a residence telephone per month against Appellee's \$3.00 per month. Trans., p. 306.

That there is difference in the character and value of the service furnished by the two companies in the same city is manifest; otherwise the business public of Memphis would not pay Appellee \$7.00 if they could get the same thing from the other company at \$4.00. And no one in Memphis would pay \$3.00 per month for a residence telephone, when the same service could be had from a business rival for \$2.50 per month.

This principle is recognized in *Home Telephone Company vs. Los Angeles*, 211 U. S., 280. In that case this court says:

"Passing the question of power, the Appellant contends that it was denied the equal protection of the laws, because, contemporaneously with the fixing of rates for it, different rates were fixed for another telephone company doing business in the city. The only information we have on the subject is in the allegations of the bill, that a competitor of the complainant engaged in like business was allowed to charge for telephone service sums greatly in excess of those prescribed by the ordinance, and that these rates discriminated against the complainant and deprived it of the equal protection of the laws. An important question is thus suggested, but we think the allegations are so vague that we can not pass upon it. Whether the two companies operated in the same territory, or afforded equal facilities for communication, or rendered the same services does not appear. For aught that appears, the other company may have brought its patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground of classification may have existed."

But if we consider the rates charged elsewhere, no intelligent comparison can be drawn between such rates and the rates charged in Memphis. There is a list of 46 cities found on pages 210 and 211 of the record in which different rates for telephone service are charged, and this list furnishes conclusive evidence

that a mere comparison of rates elsewhere is of no value. In this list it appears that in Albany, N. Y., the business rate for 3,500 subscribers is \$48.00; in Los Angeles, the same business rate is charged for 16,000 subscribers; and in Louisville, Ky., for 8,000 subscribers; in Minneapolis and St. Paul, for 14,000 subscribers; by another company in Memphis, Tennessee, for 3,500 subscribers; in Seattle for 6,500 subscribers; in Toledo, Ohio, for 9,000; and in Newark, Pa., for 2,500. In Birmingham, Ala., a residence rate of \$18.00 is charged for 3,300 subscribers; in Muncie, Ind., the same rate is charged for 1,600 subscribers; and in Racine, Wis., for 2,100 subscribers. In Albany, N. Y., a residence rate of \$24.00 is charged for 3,500 subscribers; in Columbus, Ohio, for 6,000 subscribers; Dayton, Ohio, 4,000 subscribers; Fall River, for 1,200 subscribers; and in Los Angeles for 16,000 subscribers. All of which simply shows that no intelligent conclusion can be drawn by a mere comparison of rates in different cities.

And it is worthy of note just here that in the case of *Railroad Commission of Louisiana vs. Telephone Company*, 212 U. S., 414, it is insisted by the telephone company that the reasonableness of its rates was sustained because the record showed without controversy that no company in America charged less, and many companies charged more than the rates involved in that case. The court did not notice this insistence in its opinion, and decided the case upon the net profit basis.

It is shown in this record that the City of Chicago appointed a committee to investigate telephone rates with a view of adopting an ordinance regulating telephone charges in that city, and this committee had under consideration the telephone subject constantly from January 24, 1906, to July 26, 1907, a period of 18 months. Trans., p. 316. This committee had the advice of the most competent experts that could be secured. After several months of consideration, listening to statements of tele-

phone engineers and argument of counsel, the committee states that "being convinced more and more of the intricacies and technicalities of the subject, the committee decided at its meeting held on December 4, 1906, to secure the assistance of expert telephone engineers." And thereupon it employed the services of a committee consisting of Prof. Dugald C. Jackson, a member of the Society of American Institute of Electrical Engineers, American Society of Mechanical Engineers, and American Society of Civil Engineers, formerly professor of Electrical Engineering in the University of Wisconsin, and later professor of Electrical Engineering in the Massachusetts Institute of Technology of Boston; Wm. H. Crumb, a telephone engineer of large experience; and Dr. Geo. W. Wilder, a graduate of Electrical Engineering in the University of Wisconsin, supplemented by special courses in the University of Munich and Zurich, and instructor in the Electrical Department in Armour Institute of Technology, and who instituted the Department of Telephone Engineering in the Armour Institute of Technology, and also a general telephone engineer. This commission was constantly in session from January 8th to April 4th, 1907.

The telephone committee of the City of Chicago in its report states:

The average person does not understand why it costs more per telephone to supply telephone service in a large city than in a small city. The assertion of this principle to many seems a paradox. It is regarded as contrary to the ordinary principle of business—that is, that the unit cost becomes less as the volume of business done increases. It is but natural to think that the wholesale principle ought to apply in the telephone business as in other lines. This idea prevails because the ordinary individual does not understand the peculiar features of the telephone business, and does not look beyond the telephone on the wall or on the desk. He does not take into consideration that the real business of a telephone is to furnish service, transmit messages, and not merely to rent instruments. This prevailing idea has been

constantly brought home to members of the committee by having their attention called by people thus uninformed to the lower rates existing in other cities; cities between which and Chicago there can be no common basis of comparison. Attention is called to some of the reasons for this exception to that rule of business, so well established.

"Every line added to a telephone system requires the addition of telephone office equipment to every other line in the exchange, so that the new line may be connected to any one of the existing lines.

"For every line added to an exchange, the company must not only handle the additional calls originating from that line but must provide for the additional calls originating from existing lines to the new line. The average number of calls per telephone increases with the opportunities presented for calling.

"The size of a switchboard to serve a given number of subscribers depends upon the number of messages handled and not upon the number of subscribers. It is also true that the number of operators necessary depends upon the number of messages sent and not upon the number of subscribers. It is therefore impossible in a large city to locate the lines of all subscribers in a single exchange. Mechanical difficulties interfere. In small cities one exchange is usually sufficient to supply the demand for service.

"The subdivision of a city into exchange districts, with an exchange in each district, necessitates a complete system of intercommunication between each such district and all of the other districts. The complexity of switchboard wiring and the multiplicity of trunking facilities form very expensive items of plant installation. It also necessitates the handling of a very large percentage of messages twice. In a large city a very small proportion of calls are completed within a single exchange. It is usually conceded that about eighty per cent of such calls are required to pass through a second exchange. It is thus plain to see how both the investment and the operating cost are accordingly increased.

"In a small city the business day is longer and there can be said to be no excessively busy hours. In a large city the greater volume of the business is transacted in a comparatively short period of time. The plant must therefore be constructed, and the operating force provided, to meet the business demands of the high tension hours—to

meet the 'peak.' If the increased business of the busy hours could be spread over the full business day it would greatly decrease both the investment necessary and the cost of operation.

"An enlarged exchange means an enlarged area covered and, therefore, added length to subscribers' lines. This requires a proportionate increase of investment for wires and equipment.

"A large city usually has a greater percentage of paved streets, and makes more extended requirements for underground work. Thus is increased the investment necessary for installation of the system and the expenses of maintenance incident to the repairing of wires and cables placed underground.

"There are additional causes for the increased cost of service, such as higher wages and shorter hours; destruction of underground cables by the interference of foreign electrical currents; higher rates of taxes and insurance; probable higher rates of compensation, and some additional investment for the benefit of the city, in providing space on poles and ducts and cables for the city's use."

Trans., pp. 319 and 320.

This committee recommended rates, which were subsequently adopted, of \$125.00 per annum, for a limited area in the city, for a business telephone, and more than \$8.00 per month for a residence telephone. Trans., p. 321.

The commission, composed of these three experts, in submitting their report, stated:

"A telephone company in a large city must face a problem in many respects more complex than that of any other public utility corporation. The water department is called upon to sell a single commodity, namely, water, and at prices which are fixed with comparative readiness. The gas company also is called upon to sell a single commodity, metered for nearly every customer, and its conditions in dealing with customers are relatively simple. It may sell some additional by-products, as coke, tar and ammonia, but the quantities and market values of these are readily arrived at. The traction company has a more complex problem than some of the other purveyors of public utilities, but even here the price paid by the several patrons

is uniform and the substantial difference between patrons lies only in the lengths of the rides which they may choose to take.

"The telephone problem, on the contrary, involves many complexities, partially caused by the relatively large number of classes of service which the telephone company must offer to its patrons for the purpose of fully developing the telephone service of the city, and partially by the intangible character of the electric medium with which the telephone business is carried on, the delicacy of the apparatus used, and the wide difference in the manner and extent of the use of the apparatus by the various subscribers.

"If a telephone company properly extends the telephone service in the city, it must be prepared to take care of the requirements of a range of patrons as wide as the interests of the city itself, including the largest business organizations, the hotels, the newspapers, the professional men, the small business houses, and residences of all classes. It must provide apparatus for the service of each class of patrons which will enable it to furnish the service to each subscriber at an appropriate price within his means. It is desirable for the prices to be graded so that the largest user shall not pay less than his fair share of the expense of maintaining the traffic and the remuneration to the company for its investment, and equally so that the smallest user may get his telephone service at a price which is within his means and yet is reasonably remunerative to the company for the outlay."

Trans., pp. 322-3.

It also appears in the record that the New Orleans Board of Trade thoroughly investigated telephone conditions in 1908 with a view of recommending to the Railroad [Commission of Louisiana a schedule of telephone rates for the city of New Orleans. The Railroad Commission stated, with respect to this investigation, the following:

"The investigation made by the Board of Trade appears to the commission to have been conducted fairly and without prejudice, and was most thorough and complete. The men composing the committee of investigation were men of unquestioned integrity and rank among the most prosperous and successful business men in the City of New



Orleans. They have been deeply interested in the question of securing for the City of New Orleans the best possible telephone service at the lowest compensatory rates."

Trans., pp. 229 and 230.

In order to facilitate the investigation a special commissioner was appointed by the Board of Trade, and in his report, among other things, he states:

"More than five hundred letters have been written and received by me in the course of this inquiry, and I have sought the opinions of men connected with the Bell and the Independent Companies.

"When I had classified and examined the replies received to my queries from the various telephone companies, it became abundantly apparent that, in so far as the fixing of telephone rates is concerned, comparison with other cities is worse than useless— it is absolutely misleading. There are no two cities in the United States where conditions are sufficiently similar to warrant comparison. It is a fact beyond dispute that the question of telephone rates is purely and essentially a local one; and is controlled by four factors: First, the cost of the plant; second, the cost of operation and maintenance; third, the amount of taxes and dues paid to the city; fourth, the rapidity of depreciation, due to the climatic conditions."

Trans. pp. 239 and 240.

The New Orleans Board of Trade recommended, and the Railroad Commission approved, for New Orleans a net business rate of \$10.00 per month, and a net residence rate of \$4.00 per month. Trans. pp. 264-5.

The only evidence presented by Appellant upon this subject is a pamphlet prepared by one Vinton A. Sears, who appears to have been engaged in advertising so-called independent apparatus. In his article he states:

"My experience in the telephone business has been confined to organization and operation of the Rochester Telephone Company, and I can tell you little that is not currently published outside of this immediate field.

"In competition with the Bell Company here, the

strife on our part has not been to secure the greater number of telephones, but to give the best possible quality of service, believing, what has proven to be true, that the public would loyally support a company making honest efforts to give prompt, courteous, and efficient service from all departments. Since opening our exchange we have never made aggressive canvassing for contracts. At no time have we had more than one contracting agent, and he has been kept busy following up inquiries and responding to calls for a representative of the company, and the increase in orders for telephones have come as rapidly as we could promptly and properly fill them and easily provide capital for extensions.

"For three years we have paid a dividend on our stock. The first year 4 per cent, the last two years 5 per cent, and we have a surplus equal to more than 25 per cent of our common stock. Our common stock is in active demand at more than double what it was offered for one year ago."

Trans., p. 224.

The record also shows that since the preparation and circulation of this pamphlet by Mr. Sears the very company with which he was connected has made a most miserable and discreditable failure, and that the facts stated to be the only ones with which he was familiar, were palpably false. Trans., p. 306.

It is conclusively shown from the record that the authorities of the City of Memphis not only did not make a proper investigation of telephone rates, but declined to look to the experience of the company that had been conducting the business in Memphis for twenty-five years; and it also appears that the only information relied upon by the city authorities in fixing telephone rates was of no possible value, but was positively misleading.

It must be apparent from this record that the question of fixing a schedule or tariff of telephone charges for a city the size of Memphis is a difficult one, requiring technical knowledge and skill, and that twenty-five years of experience in the business

justifies the court in accepting the evidence of such a witness, especially where there is no contradiction of what he says.

The President and General Manager of Appellee states that Appellee has exercised prudence in constructing and maintaining the property, and in the management of expenses, and in operating the Memphis exchange; that "it has endeavored to do so to the very best of its ability. This is eminently true when it is considered that the officers of this company have at all times been substantial stockholders, and, therefore, have had every incentive to see that its expenditures were of the most economical and permanent type." Deposition of Caldwell, Trans., p. 104. He also states, with respect to a comparison of rates in different cities, that "it can only be taken into account as one of the many items of study. Assuming that it was the same management, making the rates and pursuing the same policies at different localities the local conditions would all be so different as to make the study in one place useful only to a limited extent to others. There of course might be instances and circumstances where the conditions were so nearly alike as to make practically no difference; but when it is attempted to compare them with various places scattered throughout the country, the conditions and practices are all so different that it is impossible to make an intelligent comparison thereof."

Upon the question of what is a fair return of a telephone property, we submit that this record abundantly shows that ten per cent is not too much, and is entirely reasonable. The committee of the Chicago Council recommended, and its recommendation was adopted, that the company be allowed ten per cent net return. Trans., p. 331. The New Orleans Board of Trade recommended, and the Railroad Commission of Louisiana adopted, a basis of ten per cent. In the report the following language was used:

"In the telephone report of the Merchants' Association of New York, special consideration is given to what constituted a reasonable margin of profit for a telephone company, and I beg leave to quote their views on the subject. They say:

"The telephone business demands a continuous accession of fresh capital to satisfactorily serve the public. Having in view the importance to the public of constant improvement and expansion and the greatest possible efficiency of telephone service, as well as the necessity of offering an attractive investment to new capital to provide for such expansion, it is the opinion of this committee that to provide a fair return on capital actually and necessarily invested and a proper allowance for contingencies, 10 per cent margin above operating outlays is a reasonable and proper margin in the telephone business. In the various movements hitherto made for the limitation by law of telephone profits, wherever the permissible percentage of profits has been dealt with, this margin has been accepted as a proper one. It has also been specified by law in the case of some other public service corporations."

This conclusion was acceded to by the New York Telephone Company, and I have no hesitancy whatever in endorsing it as just and equitable in the case of the Cumberland Telephone & Telegraph Company."

Trans., p. 264.

It thus appears that both legislative bodies and business men's associations in New Orleans, Chicago and New York all agree that ten per cent net profit is reasonable in a telephone business. Mr. Caldwell, the President and General Manager of Appellee, says that seven per cent is not enough. Trans., p. 118.

There is no evidence in this record to the contrary.

It is worthy of note that while the rates of Appellee in Memphis range from 16 2-3 cents to \$7.00 a month, depending upon the character of service and equipment, the City Council has only undertaken to reduce the maximum business and residence rates, which means that the large heavy users—those who use and require the service most—are to be given relief from so-called exorbitant charges, whereas all other users of service

must continue to pay what they have heretofore paid; or, as suggested by the learned City Attorney in his brief, be compelled to pay more in order that these heavy users may pay less. Indeed, the argument is presented that the smaller users can be made by Appellee to pay more in order to equalize the losses sustained in the reduction of the heavy users of telephone service.

The learned City Attorney wholly misapprehends the purpose of Appellee in introducing the contract between Appellee and Appellant, made in July, 1903, and shown in the record on pages 57 and 58. That contract was introduced for two purposes: first, to show a recognition by the City of Memphis of Appellee's rights to occupy the streets of the city; and, second, to show that the city authorities recognized the fact that rates as high as an average of \$1.00 per week was a fair rate to be charged by Appellee. Criticism is offered by the City Attorney because it is not shown in the evidence that the contract has expired, it providing that the limitation on rates was to expire when the number of stations exceeded 7,000, and it is insisted that the evidence does not show that the stations exceed that number. It was unnecessary to introduce any evidence to show this fact, since it is expressly admitted in the answer that the number of stations exceeded 7,500.

We might suggest to the learned City Attorney that when he insists that the contract of July, 1903, is still operative, he destroys his client's defence, since the ordinance fixing rates only applies by its terms to telephone companies not having a rate contract with the city.

This contract, therefore, shows that in 1903 the city authorities recognized the fact that as the number of exchange stations increased, the charge per stations should increase; and it was recognized at that time that when the stations exceeded

7,000 a limitation of \$1.00 per station per week would be unfair and unjust to Appellee. Yet, when this ordinance was adopted the stations did exceed 7,000, but the price did not exceed \$1.00 per week. Trans., p. 146.

From all the foregoing it must be apparent that the telephone business is not only "intricate and technical," but that it is inherently different from other kinds of business.

A telephone plant can never be a completed property. As the city grows new patrons desire service. Each new patron must have special equipment for his own use, and his special equipment must be so connected with the former patrons' equipment so as to enable an interchange of connections. This, of necessity, results in a constantly increasing capital or construction account. Unlike the street railroad, a telephone property can not acquire a new patron without new capital and new construction. Unlike the gas company, it can not build its mains and pipes with which new patrons connect without expense to the gas company.

In this respect the capital or construction account of a telephone exchange constantly increases if it meets the interests and requirements of the community.

It appears in this record that the construction account of the Memphis exchange increased from 1902 to 1907 \$602,526.47—more than one hundred thousand dollars per year. Trans., Ex. 1, following p. 142. It also appears that the gross earnings during that same period increased \$143,180.14 per annum, and the expenses increased \$145,121.21 per annum. The average rate per station in 1902 was \$40.91, while in 1907 it was only \$40.10. The expenses per station in 1902 was only \$34.78, whereas in 1907 it was \$37.08.

It thus appears from the experience of Appellee in the City

of Memphis from 1902 to 1907 that what is claimed and generally recognized by telephone experts for the peculiarities of this particular business, is verified.

It is shown conclusively that a reduction in charges will have no effect whatever upon the expenses of conducting the business. It is also shown in this record that if the rates prescribed by the City of Memphis should be put into force it would not result in the reduction of the expenses of conducting the business; but, on the contrary, would most likely result in an increase, since if a reduction of the charges should result in increased patronage, this would necessitate a corresponding increase in capital or construction account, and as the number of stations connected increase the expenses increase in geometrical proportion; so that a decrease in rates by no possibility can increase the net profits. And in this respect it is inherently different from other known public utility companies. This principle is recognized in *Railroad vs. Telephone Company*, 212 U. S., 414.



### CRITICISMS OF THE CITY ATTORNEY.

It is claimed by the City Attorney that at least \$140,000.00 of Appellee's construction account in the Memphis exchange is fictitious. This claim is based upon these facts: Gen. Carnes sold 49 per cent of the stock of the Memphis Electric Telephone Company for 80 cents in the dollar, or \$39,200.00. Since the capital stock was only \$100,000.00, and since Appellee paid \$220,000.00 for the Memphis exchange a few days after this sale of stock, counsel concludes that the difference between \$220,000.00, the purchase price, and \$80,000.00, the market value of the stock, is of necessity, fictitious. This conclusion is not warranted. It is not to be presumed that the Appellee paid more than twice the value of a property, without *some* evidence. The City Attorney overlooks the fact that the value of stock only represents the difference between the value of the assets and the indebtedness of the company. Appellee did not purchase the *stock* of the Memphis Electric Telephone Company, but purchased "the property, assets and franchises." Trans., p. 85. This is all that the record shows upon which so serious a charge is lodged by the City Attorney.

Counsel for the city criticises certain expenses incurred by Appellee during the year 1907, and especially what is called "Traveling Expenses." He can not understand how Appellee could incur traveling expenses in operating, maintaining and constructing an exchange in the City of Memphis.

It is undoubtedly a fact that all expenses of every kind must be accounted for under one head or another, and it must also be recognized that different headings are necessary and proper in making up and keeping telephone records. It will be observed on pages 252-4 of the record that all expenses are grouped under the following headings; General, Operating, Maintenance, and

Reconstruction. Of necessity a telephone plant in a city the size of Memphis must incur traveling expenses, whether it be called such or something else. Employes putting in and taking out telephones, hauling material and apparatus to install equipment in subscribers' houses, hauling material from the warehouses, or freight depots, troublemen going about the city looking after defects in the service and remedying defects in the subscribers' instruments, must of necessity go either in vehicles provided by the company or in rented vehicles. Whether they be provided by the company or rented, it is an expense on the business, and this expense must be reflected somewhere. It has been thought convenient by the Auditing Department of Appellee to group such expenses under the word "Traveling." It may be that some other word would be better, but the result in the business at the end of the year is the same whether grouped under one head or another. Counsel says that the company had a strike to contend with in 1907, and that therefore, a fairer comparison would have been to take the result of the operations for 1906. He overlooked the fact that the result of the operations for 1906 *are* given. Trans., p. 61. When this statement was filed only seven months of 1907 had expired, and the comparison with that year was for seven months only. But when the Auditor's deposition was taken in 1908, he gave the figures for the entire year 1907. Trans., pp. 146-7.

The City Attorney also objects to certain items of legal and operating expenses. His insistence is that these expenses were incurred because of a strike. Certainly the expenses were incurred and paid. If they were not shown in the operations for 1907, where, indeed, would they be shown? It was a necessary expense and must be borne by the Memphis exchange.

Exception is taken by the learned City Attorney to the method pursued by Appellee with respect to its exchange building in Memphis. What Appellee does is not to include the cost of

real estate and buildings in the construction account of the telephone exchange. This is done merely as a convenience. The real estate is carried on a separate account and no part of its cost or value is reflected in the cost or value of the exchange plant; but, as it is necessary to have this real estate and buildings in order to house the switchboard apparatus and provide space for its managers, clerks and other employes, the expense of taking care of it is an expense on the business, and whether it be treated as a part of the exchange and the expenses included generally, or whether it be treated in a separate account and the expense incurred in maintaining it charged against the exchange plant, is wholly immaterial so far as the public is concerned; and it is entirely a matter of indifference to Appellee whether the suggestion of the City Attorney be adopted or not. If desirable, the cost or value of the real estate and exchange buildings in Memphis may be added to the construction account of the telephone exchange, and then, of necessity, every expense of taxes, insurance, repairs, light and heat will become a part of the general expenses of the exchange. The only result of this practice would be to increase the construction account upon which the company would be entitled to a return; so that while it may appear entirely improper to the City Attorney for the company to have this system of bookkeeping, when it is analyzed, it is seen that it is a wholly immaterial matter.

Exception is taken to what is called the  $4\frac{1}{2}$  per cent contract between the American Telephone & Telegraph Company and Appellee. This contract is shown to be fair in all respects by Appellee's President and General Manager. Trans., pp. 109 and 110. This same contract was examined by the New Orleans Board of Trade and approved. Trans., p. 256. A similar contract was examined by the Chicago Telephone Commission, and approved. Trans., pp. 331-3. It is not disapproved, or even criticised, by any witness in the record. It is only criticised by the City Attorney in his brief.

Exception is taken to the amount allowed the Memphis exchange for handling toll messages in and out of Memphis over the long distance lines of Appellee. This is another matter that becomes immaterial upon analysis. It is shown by the President and General Manager and the Auditor of Appellee that this is the amount allowed generally by telephone companies to each other for similar service, and this amount has been found through experience of a long time to be proper, and there can be no just criticism of it. If, however, Appellant insists upon charging into the receipts of the Memphis exchange the total amount received at Memphis for long distance business, then Memphis must, of necessity, concede the justness of the rule which would require that the Memphis exchange construction account be charged with the proportionate amount of the cost of constructing these various toll lines, and the expenses charged with a proportionate amount of their maintenance and reconstruction. If this should be done it would result in the City of Memphis, before it could intelligently fix exchange rates in Memphis, having to ascertain the cost of the entire toll line system from Evansville, Indiana, to New Orleans, Louisiana, to Chattanooga, Tennessee, and as far north again as Louisville, Ky. It may be that just such difficulties occurred to the Legislature when it declined to give the city authorities of Memphis the authority to regulate telephone rates.

The City Attorney says in his brief that only the receipts within the corporate limits of the city are credited to the Memphis exchange. This is erroneous. *All* the receipts from the *entire* exchange are credited to the Memphis exchange. The confusion of counsel arises from the statement of the Auditor that in showing the reduction in receipts under the rate ordinance, *only* those telephones *within* the corporate limits were considered. Trans., p. 137. A telephone exchange does not merely serve the inhabitants of a city—it serves a community of people.

Corporate limits are artificial lines, and are unknown to a telephone exchange. The plant is a community affair, and not merely a city affair. Of course, the city could not fix rates beyond its jurisdiction, therefore, only rates inside the corporate limits were considered in showing the reduction which would result, if the rate ordinance should be enforced. *The fact that a telephone exchange serves patrons both within and without the corporate limits is another good reason why the State has not delegated its authority to the city to regulate the rates to be charged for exchange service.*

Objection is taken to the method of charging general expenses, and the City Attorney is surely mistaken when he says that this method was adopted for this particular lawsuit. It will be observed by an examination of the record, on page 253, that this is the general practice of the company; and the City Attorney has been unable to even suggest a fairer basis. We submit that these expenses can not be prorated on a net earnings basis, as suggested by the City Attorney, since expenses must be figured before net earnings are ascertained. Therefore, these expenses must be prorated on some basis before net earnings are ever ascertained, and there seems to be no other way to prorate them except on the other expense incurred.

The City Attorney says that the President states the net return for 1907 to be 2.56 per cent, while the Auditor states it to be 2.80 per cent. The President was testifying as to the year 1907 up to November 30th. (Trans., p. 89.) The Auditor was testifying as to the entire year. (Trans., p. 129.)

There are other objections advanced by the City Attorney, but in our view of the case are immaterial on this appeal.

It is, therefore, insisted on behalf of Appellee, first, that this court is without jurisdiction to hear the case on appeal; second, that the city of Memphis had no authority to pass the ordinance

regulating rates to be charged for telephone exchange service; and, third, even though the city had such authority, it was not exercised in a lawful manner.

For these reasons we ask that the appeal be dismissed, and if not, that the decree of the court below be affirmed.

Respectfully submitted,

LUKE E. WRIGHT,

ELDRIDGE E. WRIGHT,

WM. L. GRANBERY,

*Solicitors for Appellee.*





CITY OF MEMPHIS *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 42. Argued November 8, 9, 1910.—Decided December 12, 1910.

The right of the Circuit Court to take jurisdiction of a case as one arising under the Constitution and laws of the United States must distinctly appear in the allegations of the bill; but this court may take jurisdiction of direct appeal from the Circuit Court under § 5 of the Court of Appeals Act if it properly appears that a right under the Constitution and laws of the United States was duly claimed during the case. *Loeb v. Columbia Township*, 179 U. S. 472.

While the opinion of the Circuit Court may not be examined to ascertain what should, under proper practice, appear in the pleadings or bill of exceptions, it may be looked to, when annexed and forming part of the record, to ascertain whether either party claimed, and was denied, a Federal right.

Municipal legislation passed without authority of the State does not lay the foundation of Federal jurisdiction; and statements in the bill to the effect that the ordinances complained of were unauthorized and illegal will be held to refer to the state, rather than to the Federal, constitution, in the absence of distinct references to the latter.

*Quære*, whether a bill within the jurisdiction of the Circuit Court can be construed as charging that the action of a municipality was without authority from the State and also that such action denied plaintiff his constitutional rights under the Fourteenth Amendment.

Where diverse citizenship exists and the bill alleges, and the Circuit

MEMPHIS *v.* CUMBERLAND TELEPHONE CO. 625

218 U. S.

Opinion of the Court.

Court holds, that the defendant municipality had no authority to pass the ordinance complained of, the case is not one arising under the Constitution and laws of the United States; and, although the judge may have declared in his opinion that the ordinance violated complainant's Federal rights, this court has not jurisdiction on a direct appeal under § 5 of the Court of Appeals Act.

THE facts, which involve the jurisdiction of this court of a direct appeal from the Circuit Court of the United States, are stated in the opinion.

*Mr. Charles M. Bryan*, with whom *Mr. Marion G. Evans* was on the brief, for appellant.

*Mr. William L. Granbery*, with whom *Mr. Luke E. Wright* and *Mr. Eldridge E. Wright* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

We are met at the threshold of this case with a challenge of the appellate jurisdiction of this court. The case was begun in the Circuit Court of the United States for the Western District of Tennessee by a bill filed by the Cumberland Telephone and Telegraph Company against the city of Memphis, seeking to enjoin the enforcement of the provisions of an ordinance of that city passed September 24, 1907, regulating charges by telephone companies in the city.

The bill averred that the complainant was a corporation organized and existing under the laws of the State of Kentucky, and that the respondent, the city of Memphis, was a municipal corporation created and existing under the laws of Tennessee. The jurisdiction of the Circuit Court, therefore, might rest upon diverse citizenship. Concerning the ordinance regulating the charges of telephone rates, the enforcement of which it was the object of the suit to enjoin, it was averred to be null and

void, for the reason that the city of Memphis was incorporated under a legislative act of the State of Tennessee, with certain powers and authority which nowhere included, either by express terms or necessary implication, a power to fix and regulate telephone charges, and that the attempt to do so was an abuse of power and an attempt to exercise a power which the city wholly lacked.

The bill also charged that the ordinance was null and void because it was unjust, inequitable and unreasonable, because the tariff rates fixed were so low that complainant could not operate its exchange without actual loss of money; that said ordinance was in truth and effect confiscatory; and that it totally destroyed the value of the complainant's plant in the city of Memphis for profitable use as a telephone exchange. The prayer of the bill was for an injunction against the enforcement of the ordinance in question.

A preliminary injunction was granted, the judge holding the Circuit Court at that time delivering an opinion announcing the conclusion that the ordinance in question was passed by the city without legislative authority, the court saying that was all which was necessary to decide at that time, but beyond that he thought the city estopped by a certain contract which was set up in the bill from adopting the ordinance in question, and a preliminary injunction was granted.

The answer took issue upon the allegations of the bill, a considerable amount of testimony was taken as to the reasonableness of the rates fixed in the ordinance, and the judge who heard the case upon the merits reached the conclusion that the rates fixed in the ordinance were confiscatory, and said: "That result seems to us to be destructive of the complainant's rights under the Constitution of the United States."

Adverting to the opinion delivered upon the granting of the temporary injunction, the court rendering the final

decree stated that the former decision was based upon a want of authority in the city to pass the ordinance and the estoppel of the contract set up in the bill, adding: "We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, or inclination to do so, because we are entirely content to decide the case upon final hearing upon the one ground herein discussed."

As was said by Mr. Justice Moody, speaking for the court in *Macfadden v. United States*, 213 U. S. 288, a right to review the judgments of the Circuit Courts of Appeals and of the Circuit and District Courts of the United States rests upon different grounds, and that unless this fact is borne in mind confusion is liable to result. The appellate jurisdiction from the Circuit Court of Appeals to this court, as Mr. Justice Moody pointed out, is determined by the sources of jurisdiction of the trial court, and depends upon the finality of the judgment of the Circuit Court of Appeals, as under § 6 of the Court of Appeals Act in all other cases there is a right of review in this court if the amount in controversy exceeds one thousand dollars. The right to come directly to this court by appeal or writ of error from the District or Circuit Courts of the United States arises under § 5 of the Court of Appeals Act, and so far as the case now under consideration is concerned, depends upon the case being within the class of cases mentioned in that section, namely, "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The right to take jurisdiction of a case in the Circuit Court of the United States arising under the Constitution or laws of the United States must appear in the allegations of the bill or petition with such distinct averments as to show that it is such. Under § 5 of the Court of Appeals Act the right to come to this court by direct

appeal is given in any case in which it is "claimed" that a constitution or law of a State is in contravention of the Constitution of the United States. It is thus apparent that the claim to give a right of appeal under this section need not necessarily be in the pleading of the party invoking the jurisdiction of the court. It is sufficient if such right is duly claimed in the case. The statute is silent as to how this claim shall be made. The subject was under consideration in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, and the distinctions between the requirements of jurisdiction in an appeal to the Circuit Court of Appeals and an appeal direct to this court were pointed out. In that case it was held that where the defendant brought the constitutional question into the record by demurrer, and the opinion of the Circuit Court showed that it had considered and determined that question, the proper basis for jurisdiction by direct appeal to this court was shown.

In saying that the opinion of the Circuit Court might be looked to when annexed and transmitted as part of the record, to ascertain whether either party claimed that a state statute was in contravention of the Constitution of the United States, this court, in the *Loeb case*, added: "By this however we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions or by an agreed statement of facts or by the pleadings."

In *Lampasas v. Bell*, 180 U. S. 276, a suit was brought against the city of Lampasas to recover upon certain bonds, and the jurisdiction rested upon diverse citizenship. The defendant sought to introduce a constitutional question into the record in the contention set up in the answer, that the residents of certain territory incorporated into the city had not been given an opportunity to be heard as to whether they should be included in and

be subject to taxation in the proposed incorporation. It was therefore contended that the bonds were void, and an attempt to levy and collect taxes to pay them was in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States. This court dismissed the writ of error, saying:

"This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases, one of which is when 'the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' Sec. 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828. But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western Union Telegraph Co. v. Ann Arbor Railroad Co.*, 178 U. S. 239: 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.' And it must appear on the record by a statement, in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571."

In this case a perusal of the bill, answer and testimony in the case makes it apparent that if brought into the record at all, the alleged claim of a violation of the Federal Constitution by a state law must be found in the bill itself. It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the State, and its attempted passage

it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the Fourteenth Amendment. It is hardly necessary to say that that Amendment is aimed at state action, in the provision that no State shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the Fourteenth Amendment by an authorized action of the State, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of Federal jurisdiction has been repeatedly held in this court. *Hamilton Gas Light Company v. Hamilton*, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: "A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

In *Barney v. City of New York*, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the State, hence the action did not invoke the protection of the Fourteenth Amendment because of action by the State of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. *City of Louisville*



v. *Cumberland Telephone & Telegraph Co.*, 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the Constitution and laws of the United States. This was held to be so because of other statements of the bill, which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the State of Kentucky to the municipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the Commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the state constitution, which, as well as the Federal Constitution, in-

hibits attempts to take property without due process of law. *Harbinson v. Knoxville Iron Co.*, 103 Tennessee, 421.

It is suggested that the bill, when properly construed, may have a two-fold aspect, one of which charges that the city acted without authority of law and the other that, conceding the city to act with authority, the rates fixed were confiscatory, in violation of the Federal Constitution. Assuming that a bill might be framed in this manner, it is sufficient to say of the present bill that it is not one of that character. There is nothing in it qualifying the allegation as to the action of the city without authority of the State, and as we have said, the allegations as to the confiscatory character of the ordinance are to be referred, as they can be consistently with the other allegations of the bill, to the state constitution, which would be violated if such allegations were true. This construction harmonizes the bill and does violence to none of its averments.

The case then is this: The first and only reference to the Federal Constitution is in the final opinion of the Circuit Judge who heard the case upon the merits, in the part of the opinion above quoted, to the effect that the rates fixed are in violation of the complainant's rights under the Federal Constitution. This observation was doubtless made by the learned judge as the equivalent of saying that the rates were confiscatory, and therefore unlawful; but, whether so or not, so far as it makes the Fourteenth Amendment a ground of decision, it is inconsistent with the position taken in the bill, and as there is no basis for a claim of denial of rights under that Amendment in the case, it cannot be made the ground of direct appeal to this court under the fifth section of the Court of Appeals Act.

We are of opinion that this case must be dismissed for want of jurisdiction in this court, and

*It is so ordered.*

MEMPHIS *v.* CUMBERLAND TELEPHONE CO. 633

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

MR. JUSTICE WHITE, with whom concur MR. JUSTICE McKENNA and MR. JUSTICE HUGHES, dissenting.

As I cannot concur in the judgment of dismissal, in view of what seems to me to be the importance of the subject, the reasons for my dissent are expressed.

Let me restate the case. In September, 1907, the city of Memphis passed an ordinance fixing maximum telephone rates. The telephone company filed its bill to enjoin the enforcement of the ordinance. Diversity of citizenship was alleged. The relief prayed was based upon substantially the following grounds: *a*, that as the legislature of Tennessee had conferred no power upon the city of Memphis to fix rates, the city was wholly lacking in authority to pass the ordinance, and the same was therefore void; *b*, that the ordinance was void "because it is unjust, inequitable and unreasonable, in that it fixes the maximum tariff or rate of charges beyond which your orator is forbidden to go, under severe penalties, which is so low that your orator could not operate its exchange without actual loss of money to it; and, indeed, is in truth and effect confiscatory, in that it totally destroys the value of your orator's plant in the city of Memphis for profitable use as a telephone exchange." The paragraph of the bill containing the foregoing concluded as follows: "Your orator further states that said ordinance was passed by the legislative council of said city, not only without making any investigation whatever, but in ignorance of what was a reasonable rate (assuming that it had the power to deal with the subject at all, which is denied), and without the least regard to the vested rights of your orator, or to equity and justice, and it is, for the reasons set forth in this paragraph, null and void;" *c*, that the ordinance was moreover void because it was unequal and discriminatory in consequence of a proviso to the first section exempting from its operation telephone com-

WHITE, McKENNA and HUGHES, JJ., dissenting. 218 U. S.

panies whose rates were fixed by contract with the city of Memphis.

By its answer the city asserted the power to pass the ordinance and traversed the averments of the bill as to confiscation and discrimination. A final decree was awarded adjudging the ordinance to be null and void and permanently enjoining its enforcement. The court, premising by "assuming that the city of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis," came to consider the constitutional limitations to which the exertion of that power was subjected. Dealing with that subject, it was pointed out that the power to fix rates could not be so unreasonably exerted as to amount to confiscation, and, examining the proof as to the operation and effect of the rates established by the ordinance, it was found that they were of that character. The court said:

"The holders of stock in the complainant company are entitled to a fair return upon their investment if the company can earn it, but the testimony leaves no doubt that the rates prescribed by the ordinance would leave practically nothing to the stockholders.

\* \* \* \* \*

"If to large taxation and other enforced expenditures already properly exacted, the city (now that complainant's plant is fully installed) can add the burden of rates fixed arbitrarily that would so diminish earnings (though not expenses) as to leave no dividends whatever for stockholders, manifestly the money invested by them would be used for the benefit alone of the people of Memphis and not at all for the profit of those who made the investment under inducements offered by the city.

\* \* \* \* \*

"That result seems to us to be destructive of complainant's rights under the Constitution of the United States.

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

"In Judge Clark's opinion upon the motion for the temporary injunction it is clearly indicated that that learned and lamented judge thought that the city had no power or authority to enact the ordinance for two reasons, viz: 1st, because the State had never given the city such authority, and, 2d, because the city had a contract with the complainant which could not be thus impaired.

"We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, nor inclination to do so, because we are entirely content to decide the case on final hearing upon the one ground herein discussed."

The city appealed directly to this court upon the ground that the case is one where a constitutional right was claimed below and hence is susceptible of being directly reviewed here under § 5 of the Judiciary Act of 1891. On the hearing at bar it was suggested on behalf of the telephone company that the record did not disclose that the protection of the Constitution of the United States was claimed by the telephone company, and therefore the bill should be dismissed, and the court gives effect to that suggestion by its decree of dismissal.

Before ascertaining whether the record establishes that there is a claim of Federal right authorizing a direct review, it is necessary to fix definitely what constitutes the record. The contention on this subject involves the inquiry whether the opinion of the court below is part of the record, and if it is a part of the record and it be conceded that a question of Federal right was decided below, does that fact establish the existence of a claim of constitutional right justifying the direct review within the meaning of the act of 1891? To my mind an affirmative answer to both these propositions is required if previous decisions of this court be now applied.

In *Loeb v. Columbia Township Trustees*, 179 U. S. 472, the case was this: Loeb, a citizen of Indiana, sued the

WHITE, McKENNA and HUGHES, JJ., dissenting. 218 U. S.

trustees of Columbia Township in Hamilton County, Ohio, in a Circuit Court of the United States, to recover the amount of certain bonds issued by the township. The defendant filed a general demurrer. This demurrer was sustained, and the plaintiff electing not to plead further, judgment was rendered for the defendant. The court, in the opinion by it delivered, declared that it had sustained the demurrer because it had concluded, as claimed by the defendant on the argument of the demurrer, that the law under which the bonds were issued was repugnant to the Constitution of the United States. A writ of error having been prosecuted directly from this court, the right to prosecute the same was challenged, and came to be disposed of when the case was considered. The court said (p. 477): "The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the Circuit Court." The court then proceeded to consider whether it was "sufficiently informed by the record that the defendant township, under its general demurrer, 'claimed' in the Circuit Court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the Constitution of the United States?" It was held (p. 481) that although the demurrer was general, and did not make reference to any claim of the protection of the Constitution of the United States, "it was certainly competent for the township to claim at the hearing of the demurrer" that the state enactment under which the bonds were issued "upon its face was repugnant to the Constitution of the United States, and therefore void." The court, after pointing out that there was nothing in the record outside of the opinion of the court showing that a claim of Federal right had been made and decided, was brought to consider whether it had a right to look

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

at and was controlled by the result of the opinion showing that the Federal right had been claimed. The previous decisions of this court relating to that subject were then fully and carefully reviewed. The difficulty which had existed in ascertaining whether a Federal question had been specially set up or claimed on writs of error to state courts during the prevalence of the conception that the opinion of the state court formed no part of the record and could not be looked at, was adverted to, the rule adopted by this court to correct that situation and by which it had become established that the opinion of the state court could be referred to in order to ascertain whether a Federal right had been specially set up and claimed was stated, and it was observed (p. 483):

"The rule of our court referred to does not apply alone to cases brought here from the highest court of a State. It applies, in terms, to all cases brought to this court by writ of error or appeal. What, therefore, was said in the above cases as to the object and effect of the rule applies to records from a Circuit Court of the United States."

Applying the rule settled in the *Loeb case*, and hence treating the opinion in this case as a part of the record, it is not subject to question that it affirmatively shows that the decree rendered in favor of the telephone company, adjudging the ordinance to be null and void, was placed upon the express conclusion that the ordinance was repugnant to the Constitution of the United States. Is this then sufficient to establish for the purposes of the jurisdiction of this court that a Federal question was claimed? This is to be determined, as held in the *Loeb case*, by the principles applied by this court in testing its jurisdiction to review the judgments or decrees of a state court under § 709 of the Revised Statutes. That is to say, the fact that the court below expressly decided a Federal question must be given the same weight as would be given the express determination by a state court in its opinion of a



WHITE, McKENNA and HUGHES, JJ., dissenting. 218 U. S.

Federal question for the purpose of ascertaining whether a Federal right was specially set up and claimed in the state court. The rule upon this latter subject was thus stated in *Missouri, Kansas &c. Ry. Co. v. Elliott*, 184 U. S. 531, 533, as follows:

"The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains. *Oxley Slave Co. v. Butler*, 166 U. S. 648, 660. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised, and it is actually considered and decided by the state court the right to review exists. *Mallett v. North Carolina*, 181 U. S. 589, 592."

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

And the *Elliott case* has been repeatedly approvingly referred to and the doctrine which it announced expressly reiterated. *Burt v. Smith*, 203 U. S. 129, 134; *Smithsonian Institution v. St. John*, 214 U. S. 19, 28, and cases cited.

Consistently with these rulings I am unable to conclude that the case made upon the record does not affirmatively establish a claim of constitutional right authorizing the direct review of the action of the court below in deciding a question of that character.

Even at the risk of repetition let me briefly consider the grounds by which it is insisted that this case is not controlled by the authorities above referred to. They may be thus resumed: First, because the bill, it is insisted, did not complain of any action by the State of Tennessee against the rights of complainant, but simply alleged that the city of Memphis had, without authority, attempted to destroy the complainant's rights, thus, it is urged, excluding power in the court to decide that a violation of the Constitution of the United States had been brought about. Second, because even if the complainant did not in express terms exclude all claim of Federal right, nevertheless there was no right in the court to decide a constitutional question, since, taking the complaint as a whole, it clearly appears that its purpose was to assert only rights under the laws of the State of Tennessee, and to exclusively invoke protection of the state constitution. Aside from the abnormal limitation on the judicial function which must arise from holding that without the consent of a litigant a judge, in a case over which he has jurisdiction, may not apply and enforce the Constitution if he deems the facts justify or require him to do so, the propositions, it seems to me, misconceive the averments of the bill. I say this, since they disregard the fact that in substance, while denying the want of power to pass the ordinance, the bill moreover proceeded upon the alternative that if there was power the ordinance was void because of the confiscatory char-

WHITE, McKENNA and HUGHES, JJ., dissenting. 218 U. S.

acter of the rates fixed. In any event, in view of the fact that the court below expressly considered and decided the constitutional question, the case is brought directly within the statement in the *Elliott case*, which I again quote, that (184 U. S. 534) "It is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court, in deciding the case, has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains." Passing, however, further consideration of the correctness of these propositions as applied to the case made by the record and conceding them only for sake of argument to be sound, they are irrelevant to the question of dismissal, since they address themselves to the merits of the cause. In other words, if the propositions be accepted as sound, they only demonstrate that error was committed by the court below in undertaking to decide a question of constitutional right. But error in this particular, if found to exist, requires a correction of the wrong done, that is, a reversal, and not in substance the upholding of the wrong committed by refusing to review. If it be true, as announced in the previous decisions of this court, that the requirement of the statute as to the existence of a claim of Federal right for the purpose of review is subserved where the court below has expressly decided the question of Federal right, it must also be true that in such a case the duty exists to review and correct the error committed by the court below, whether such error arose from a mistake committed by the court in undertaking to decide a Federal question or from a mistake committed in deciding the question which was expressly passed upon. In other words, where the court

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

below has expressly decided a question of Federal right and made it the basis of its decree, such decision, for the purpose of review of the merits, in the very nature of things, engenders a conclusive presumption as to the making below of a claim of Federal right. The necessity of this rule cannot be more clearly demonstrated than by the case on this record, as it persuasively appears that the telephone company since the decree below has continuously claimed and enjoyed the right to be relieved from the charges fixed in the ordinance of the city of Memphis, a right possessed as the result of accepting the benefits of the decree and the relief awarded by the injunction therein issued. That is to say, it being certain that the telephone company has up to this very moment claimed the rights awarded to it by the decree, it in my opinion ought not now to be allowed to successfully assert that it made no claim to the constitutional right upon the existence of which alone the decree went in its favor. To claim the benefits of the decree amounts necessarily to claiming the existence of the constitutional right upon which alone the decree was based.

The misconception which underlies the theory upon which the judgment of dismissal now rendered is said to be sustained seems to me to be destructive of the power to directly review a decision passing on a claim of constitutional right for which the statute expressly provides. I say this because, in my opinion, the propositions relied on in reason come to this, that the authority which is conferred upon this court to directly review the actions of trial courts in deciding constitutional questions will not be exerted wherever it is found that a trial court has erroneously undertaken to decide such a question. That is to say, that the right to directly review only authorizes the correction of the lesser wrong resulting from having decided a Federal question mistakenly, and does not embrace the greater of having expressly decided a constitu-

WHITE, McKENNA and HUGHES, JJ., dissenting. 218 U. S.

tional question when there was no power to do so. The duty to review by direct appeal provided by the act of 1891 to be made efficacious in the very nature of things must embrace, not only the case where the court has erroneously decided a constitutional question, but also must extend to the case where a court has undertaken to expressly decide a constitutional question which it had no right to pass upon.

Considered from another point of view, the confusion which is involved in the propositions upon which the decree of dismissal must rest, if I correctly understand them, is equally demonstrable. As I have said, the denial of authority to review by direct appeal the action of the trial court in expressly deciding a constitutional question and awarding rights to the complainants solely upon the theory that they were guaranteed by the Constitution of the United States can only rest upon the assumption that although the court had general jurisdiction of the cause, it had not power, under the circumstances, to decide the constitutional questions which it did decide. But if this premise be true, then there is presented by the direct appeal a question which in its essence is embraced within the power which the statute confers to review by direct appeal decisions involving the jurisdiction of trial courts. The distribution of appellate jurisdiction which the act of 1891 effected was stated, and the apparent conflict between some of the adjudged cases on that subject was cleared up in *Macfadden v. United States*, 213 U. S. 288. It was reindubitably established that where the jurisdiction of a trial court was invoked on the ground of diversity of citizenship, and during the trial a question of constitutional or Federal right arose or emerged and was decided, the parties were put to the election of determining whether they would prosecute error from or appeal to the proper Circuit Court of Appeals or pursue the same course directly to or from this court. If the former course was

218 U. S. WHITE, McKENNA and HUGHES, JJ., dissenting.

adopted it was declared the right to come directly to this court was waived and the judgment or decree of the Circuit Court of Appeals on the constitutional question would be final. As the result of the ruling now made it must follow that the right of election under the circumstances here disclosed would be difficult, if not impossible of exercise, since if the election were made to bring the case directly to this court the right to review might be lost upon the theory that the lower court wrongfully undertook to decide the constitutional question which it expressly passed upon. If on the other hand the party elected to seek a review in the Circuit Court of Appeals, and the conclusion of that court was that the trial court not only had power to decide the Federal question which it had passed upon, but had rightfully decided it, the right to review in this court would be lost.

Let me come, then, to the question of authority; that is, the cases relied upon to sustain the decree of dismissal. As it is given me to understand them, none of them sustain the proposition in support of which they are cited. In view of the statement which I have previously made as to the ruling in the *Loeb case* and the matter in that case decided, it is unnecessary to extendedly notice a reference to a general expression found in the opinion in that case as to the duty of bringing into a record, by way of a formal bill of exceptions, agreed facts, etc., since the expressions relied upon cannot be given the effect now attributed to them without virtually holding that the *Loeb case* overruled itself. This is also true of certain general expressions found in the opinion in *Lampasas v. Bell*, 180 U. S. 276, decided at the same term as the *Loeb case*, and which directly affirmed the ruling there made. Of course nothing I have said, in the slightest degree, is intended to controvert the elementary doctrine that where the existence of a Federal question is essential to confer jurisdiction upon a trial court over a cause,

WHITE, McKENNA and HUGHES JJ., dissenting. 218 U. S.

the jurisdictional facts must be clearly and unambiguously alleged and not be left to surmise or conjecture. And this is all, I submit, that can rightfully be said to have been decided in *Hamilton Gas Light Company v. Hamilton*, 146 U. S. 258; *Barney v. The City of New York*, 193 U. S. 430; *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. Rep. 725. But that doctrine has no application here, since the jurisdiction of the court below existed, as diversity of citizenship was alleged. This being true, it is apparent that the cases cited can only be made here applicable by failing to distinguish between the test for determining whether sufficient foundation has been laid to justify the bringing of the powers of a trial court into play and the duty of an appellate tribunal to review the action of the trial court had in a case within its jurisdiction and authority. After patient research I am of the opinion that it is accurate to say that no case can be found in the books holding that where a trial court has expressly considered and passed upon a question of constitutional rights and awarded affirmative relief to a party before it, upon the theory that such right was involved in the cause which was within its jurisdiction, that the right to review by this court has been denied because there was no claim of right under the Constitution, since the court in passing upon the case before it erroneously based its conclusion upon the mistaken conception that stated propositions of constitutional law were claimed to be applicable.

I am authorized to say that MR. JUSTICE McKENNA and MR. JUSTICE HUGHES join in this dissent.